

<p>IN THE MATTER OF THE CLAIM</p> <p>OF RACHEL KRUG,</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 NEIL S. SNYDER,</p> <p>T/A EXTERIOR EXPERTS, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE LAURIE BENNETT,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH No.: DLR-HIC-02-15-25812</p> <p>* MHIC No.: 15 (75) 1201</p> <p>*</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On June 9, 2015, the Claimant filed a claim (the Claim) with the Maryland Home Improvement Commission (the MHIC) Guaranty Fund (the Fund) for reimbursement of \$21,840.00 in alleged actual losses suffered as a result of a home improvement contract with the Respondent, a licensed home improvement contractor.

I held a hearing on January 6, 2016 at the Office of Administrative Hearings (OAH), Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ John B.

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

Bratt, Esquire, represented the Claimant, who was present. Eric S. Lickstein, Esquire, represented the Respondent, who was present. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (the 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 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.

ISSUE

Did the Claimant file the Claim within three years from the date the Claimant discovered, or by exercise of ordinary diligence should have discovered, the loss or damage that constitutes the Claim?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits that the Claimant offered:

1. Contract with the Respondent, June 3, 2010
2. Proposal from Brothers Services Company, July 30, 2014
3. Proposal from Park Heights Roofing, Inc., July 24, 2014
4. Estimate from Complete Mold Control Contracting, LLC, June 3, 2015
5. Report from Industrial Hygiene Consulting, Inc., April 15, 2015
6. Building Evaluation, January 4, 2016
7. Photograph of the Claimant's roof
8. Photograph of roofing shingles packaging

I admitted the following exhibits that the Respondent offered:

1. (A through D) Photographs
2. (A through H) Photographs
3. Roofing shingle sample
4. Photograph
5. Photograph
6. Photograph
7. Photograph
8. ~~The Respondent's supply list~~

9. Sellmore Industries, Inc. invoice for the expected delivery on June 4, 2010

I admitted the following exhibits that the Fund offered:

1. Notice of Hearing, October 9, 2015; certified mail green cards
2. Hearing Order, July 29, 2015
3. Licensing history for the Respondent, printed January 5, 2016
4. Home Improvement Claim Form, received by the MHIC on June 9, 2015
5. Letter from the MHIC to the Respondent, June 19, 2015

Testimony

The Claimant testified and presented the following witness: Ross Alexander Gibson, an expert in home inspection and construction, roofing installation, and roofing maintenance.

The Respondent testified and presented the following witness, Barry Dennis Flaks, an expert in roofing and exterior contracting.

The Fund did not present witnesses.

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 33435.
2. The Claimant and her husband live at 3418 Terrapin Road, Stevenson, Maryland.
3. Neither the Claimant nor her husband is the Respondent's spouse or other immediate relative; the Respondent's employee, officer, or partner; or the Respondent's immediate relative of an employee, officer, or partner.
4. The Claimant and her husband wanted to install a new roof to replace the aging roof on their home.
5. On June 3, 2010, the Claimant and the Respondent entered into a contract in which the Respondent would "tear off and haul away existing layer of roofing on entire main roof area (3700 square feet)," "furnish and install ice and weather guard to entire underlayment area of the main roof," "furnish and install asphalt fiberglass shingles to entire main room area," and perform other roof-related improvements. Clmt. Ex. 1.
6. The total contract price was \$10,700.00.
7. Within a few days, the Claimant and the Respondent agreed to amend the contract to include shingles with a longer warranty than contemplated by the original contract, for a new total contract price of \$11,200.00.
8. The Claimant paid the contract price in full.
9. The Respondent completed the work in June 2010
10. As early as eight months after the Respondent completed the roof work, the Claimant noticed rainwater streaming into the house by the chimney. The Claimant called the Respondent. The Respondent repaired the leak by re-flashing and tarring the chimney.

11. As early as July 2011, one year after the Respondent completed his initial roof work (as opposed to the chimney repair), the Claimant noticed brown or black marks or smudges in the following locations in the living room: on the main beam that runs across the living room ceiling, the wall and ceiling, and on a heating and/or air conditioning vent on the wall. The Claimant was not sure what the marks/smudges were, but they concerned her and she believed at the time that they were caused by a problem with the roof that the Respondent installed.

12. The Claimant did not call the Respondent about the marks/smudges because she was dissatisfied with how long it took the Respondent to return her calls about the chimney leak. A lawyer suggested to the Claimant that she call two other roofing companies to diagnose the problem.

13. In the summer of 2014, three years after the Claimant first noticed the spots/smudges, she consulted two roofing contractors: Brothers Services Company (Brothers) and Park Heights Roofing, Inc. (Park Heights), both licensed home improvement contractors.

14. On July 30, 2014, Brothers estimated that it would cost \$42,261.00 or \$50,497.00 to remove the existing roof and reinstall a new roof. The price differential was contingent on whether Brothers glued down some unspecified material.

15. On July 24, 2014, Park Heights submitted a proposal to remove the existing roof and install a new roof, for a total of \$18,940.00. The Claimant accepted this offer. Park Heights performed the work called for under its proposal.

16. From 2011 to 2015, the spots/smudges in the living room worsened. The Claimant contacted Industrial Hygiene Consulting, Inc., (Industrial) to do a mold assessment, which it did on March 12, 2015. Industrial concluded that a roof leak resulted in "apparent mold growth and contamination of the house." Industrial made ten recommendations, including cleaning the ductwork and air-handling unit; removing damaged drywall at the ceiling, bulkhead, and walls of

the living room; inspecting the wall, ceiling, and bulkhead cavities for hidden old growth or water damage; and cleaning cavity surfaces. Clmt. Ex. 5.

17. The Claimant contacted Complete Mold Control Contracting, LLC (CMCC) to perform mold abatement. On June 3, 2015, CMCC gave the Claimant an estimate for \$3,000.00 to clean and sanitize the HVAC system, compromised materials (*i.e.* drywall at the ceiling, bulkhead and walls of the living room), and exposed surfaces.

18. On June 9, 2015, nearly four years after the Claimant noticed the brown/black spots that were later identified as mold the Claimant filed the Claim with the Fund for reimbursement for alleged losses as a result of the mold that the Claimant believes resulted from the roof that the Respondent installed.

19. The contract between the Claimant and the Respondent includes an arbitration provision. They waived arbitration. (Stipulation of the parties)

DISCUSSION

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. However, any claim against the Fund “**shall** be brought... within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage.” (emphasis added). Bus. Reg. § 8-405(g); COMAR 09.08.03.02G; COMAR 09.08.03.02G. Thus, the Claimant must first establish that she timely filed the Claim.

The Respondent performed the work called for in the contract in June 2010. As early as eight months later, the Claimant noticed a problem with water entering the house around the

chimney. The Respondent fixed that problem and the Claimant did not pursue the matter further.²

The Claim concerns the mold that the Claimant believes is the result of the defective roof that the Respondent installed. The Claimant testified that she is unsure when she first saw the brown/black spots/smudges that were later diagnosed as mold, but she believes it was one year, eighteen months or two years after the Respondent initially installed the roof. Because the Claimant testified she might have noticed the problem in July 2011, one year after the roof installation, that is the date from which the statute of limitations starts tolling. The Claimant did not file the Claim until nearly four years later, in June 2015.

It is immaterial that the spots/smudges were not diagnosed as mold until 2014. The question is not when the Claimant knew precisely what the problem was, but rather when she knew about, or with reasonable diligence should have discovered, her loss or damage. The Claimant knew in July 2011 that she possibly had a problem. She testified that she was concerned at that time and she believed the problem was the result of the Respondent's roof. She did not exercise diligence to diagnose the problem. Rather, she waited until 2014 to contact a roofer and until 2015 to contact a mold specialist. The three-year statute of limitations expired on or about July 1, 2014. The Claimant filed the Claim late, in June 2015. The Claim is therefore subject to dismissal.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant did not file the Claim within three years from the date that the Claimant discovered, or by exercise of ordinary diligence should have discovered, the loss or

² The Claimant takes issue with the Respondent's remediation efforts. The chimney leak is not the subject of the Claim.

damage that constitutes the Claim. Md. Code Ann., Bus. Reg. § 8-405(g); COMAR
09.08.03.02G.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's
guaranty fund claim; and

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

Signature on File

February 19, 2016
Date Decision Mailed

Laurie Bennett
Administrative Law Judge

LB/cj
#160386