

IN THE MATTER OF THE CLAIM	* BEFORE MARC NACHMAN,
OF TERESA A. DEWITT,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-15-37548
FOR THE ALLEGED ACTS OR	* MHIC NO.: 15 (90) 207
OMISSIONS OF CARROLL ALLEN,	*
T/A ALL-EN ONE CONTRACTORS,	*
LLC,	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On November 5, 2014, Teresa A. DeWitt (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for losses allegedly incurred as a result of the conduct of Carroll Allen, t/a All-En One Contractors, LLC (Respondent).

An initial hearing was scheduled for August 31, 2015, at the Kensington office of the Office of Administrative Hearings (OAH), 10400 Connecticut Avenue, Suite 208, Kensington,

Maryland. Kris King, Assistant Attorney General, represented the Fund. Neither the Respondent nor the Claimant appeared for the hearing.

Administrative Law Judge (ALJ) Tameika Lunn-Exinor conducted the hearing on August 31, 2015. Because the Claimant had the burden of proof and failed to appear for the hearing, ALJ Lunn-Exinor found that the Claimant failed to prove that she sustained an actual loss compensable by the Fund as a result of the Respondent's acts or omissions and, by order dated September 14, 2015, recommended that the Claimant not be awarded reimbursement from the Fund and that her claim should be denied.

However, due to a mailing error, the Claimant did not receive notice of the hearing, explaining why she failed to appear. The Claimant timely requested that the MHIC reopen the claim, which it did by order dated November 6, 2015. By notice dated November 28, 2015, the OAH rescheduled the hearing for February 11, 2016, at the OAH office in Kensington, Maryland.

I held a hearing on February 11, 2016, at the OAH office in Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant represented herself. The Respondent failed to appear despite notice. 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 MHIC procedural regulations, 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, 09.08.02.01B, and 28.02.01.

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

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent and, if so, what is the amount of the loss?

SUMMARY OF THE EVIDENCE

Exhibits

The following exhibits were admitted into evidence on behalf of the Fund:

- Fund Ex. 1 Recommended Decision of Administrative Law Judge Tameika Lunn-Exinor, dated September 14, 2015
- Fund Ex. 2 Correspondence from the Claimant to the MHIC, dated September 18, 2015
- Fund Ex. 3 Correspondence from the MHIC to the Claimant, enclosing Order for Remand, dated November 6, 2015
- Fund Ex. 4 Notice of Hearing, dated November 20, 2015
- Fund Ex. 5 MHIC licensing record for the Respondent, dated July 30, 2015

The following exhibits were admitted into evidence on behalf of the Claimant:

- CL. Ex. 1 Correspondence from the MHIC to the Claimant, enclosing Order for Remand, dated November 6, 2015, Fund claim, and supporting documents
- CL. Ex. 2 Photographs
- CL. Ex. 3 Correspondence between the Claimant and Respondent; correspondence between Lumber Liquidators and the Claimant, with enclosures; invoice from Lumber Liquidators, February 18, 2013 and March 6, 8, and 20, 2013.
- CL. Ex. 4 Contract and payment documents between the Claimant and Respondent
- CL. Ex. 5 Repair and replacement estimates

No exhibits were offered for the Respondent, who was not present.

Testimony

The Claimant testified on her own behalf. No other witnesses testified.

FINDINGS OF FACT

Procedure

1. On November 5, 2014, the Claimant filed a claim with the Fund for \$11,975.69 for losses allegedly incurred as a result of the conduct of the Respondent.
2. The matter was transmitted to the OAH on April 6, 2015.

3. On June 11, 2015, the OAH sent notices of a hearing to the Claimant and the Respondent by certified and regular mail to their addresses of record. The hearing was scheduled for Monday, August 31, 2015 at the OAH office in Kensington, Maryland.

4. The notice stated that a party's failure to appear might result in an unfavorable decision against that party.

5. The Claimant's regular mail notice was returned to the OAH with a notice that stated "Return to Sender Vacant Unable to Forward." The certified mail notice to the Claimant was returned with the same message.

6. The Respondent's regular mail notice was not returned to the OAH. The certified mail to the Respondent was returned as "Unclaimed".

7. The Respondent and the Claimant failed to appear for the scheduled hearing.

8. The Claimant received correspondence from the MHIC advising her of the unfavorable decision resulting from her failure to appear.

9. On September 18, 2015, the Claimant filed a request to reopen the claim due to a mailing error.

10. On November 6, 2015, the MHIC reopened the claim and transmitted the file back to the OAH for a full hearing.

11. By notice dated November 28, 2015 the hearing was scheduled for February 11, 2016.

Claim

12. On or about January 27, 2013, the Claimant contracted with the Respondent to perform home improvement work for the Claimant in her condominium, including installation of bamboo flooring over a cement floor throughout her condominium.

13. The Respondent performed the home improvements between February 20 and May 15, 2013.

14. The original amount of the contract was \$18,151.00, which was increased by \$1,814.00 to \$20,465.00 through change orders.

15. The contract covered labor and material for home improvements; some of these costs were not related to the installation of the flooring.

16. The Claimant paid the Respondent all amounts due under the contract.

17. The amount of labor costs in the contract attributable to the flooring installation was \$4,080.00. The cost of the flooring materials purchased from Lumber Liquidators by the Claimant, on behalf of, and at the direction of the Respondent was \$4,995.41.

18. The total amount of costs in the contract attributed to the flooring installation was \$9,075.41.

19. The Claimant paid the Respondent for the work that was done, which exceeded \$9,075.41, the amount of the home improvement attributable to the flooring:

20. Soon after the installation, the floor began to buckle in several areas.

21. The Respondent returned to the Claimant's home and trimmed some of the areas, but because the flooring was not properly installed, the floorboards begin to separate.

22. The Claimant contacted Lumber Liquidators, the supplier of the flooring, which explained that the cement flooring in the Claimant's condominium should have been properly prepared before the bamboo flooring was installed using moisture barriers and proper cement, neither of which were done correctly by the Respondent.

23. The flooring installed by the Respondent now has to be removed and replaced with new flooring after properly preparing the condominium floor.

24. The cost of the labor and materials to correct the unworkmanlike home improvement is between \$10,850.00 and \$17,550.00.

25. The actual loss awardable to the Claimant is \$9,075.41.

DISCUSSION

I. Prior hearing

The Claimant failed to appear for the initially-scheduled hearing. After determining that proper notice of the hearing was mailed to the Claimant, ALJ Lunn-Exinor conducted the hearing in the absence of the parties and issued a recommended decision dismissing the claim. COMAR 09.08.03.03A(2); COMAR 28.02.01.23A. However, notice of the hearing did not reach the Claimant and she was not properly made aware of the hearing. The Claimant petitioned the MHIC to reopen the claim, which it did on November 6, 2015. This hearing ensued.

II. Respondent's failure to appear

A threshold question in this case is whether the Respondent received timely notice of the hearing. If the Respondent was properly notified of the hearing, the case could proceed in his absence.

A Notice of Hearing was mailed to the Respondent by certified and regular mail on November 20, 2015, to the MHIC's record address for the Respondent (Fund Ex. 4). The certified mail return receipt card was returned to the OAH marked "Unclaimed." Additionally, the Notice of Hearing mailed by regular mail to the Respondent was not returned to the OAH, indicating its delivery to the Respondent.

I find that the OAH Notice of Hearing sent to the Respondent's address of record was reasonably calculated to give the Respondent notice of this hearing. The Respondent was given adequate notice to appear at the hearing. Accordingly, I considered that the Respondent failed to

appear and the case properly could proceed in the Respondent's absence, after adequate notice was given. *See Border v. Grooms*, 267 Md. 100, 104 (1972) (the "mailbox rule"). *See also*, Md. Code Ann., Bus. Reg. §§ 8-312(h) (2004).

III. Applicable law

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. The Respondent was a licensed home improvement contractor at the time the Respondent entered into the contract with the Claimant.

For the following reasons, I find that the Claimant has proven eligibility for compensation.

IV. Claim

The Respondent performed unworkmanlike, inadequate or incomplete home improvements by not properly preparing the cement floor of the Claimant's condominium before installing bamboo hardwood flooring planks. The background of the claim is set forth in the

Findings of Fact, describing the contract between the Claimant and the Respondent, as well as the payments the Claimant made to the Respondent, the defects in the flooring and the cost to have the defective flooring removed and replaced.

The Claimant contracted with the Respondent to have a broad range of home improvements completed, including work that was not related to the flooring and for which no MHIC Fund claim was filed; five change orders were signed, none of which encompassed any flooring installation. (CL. Ex. 4). The flooring labor costs were found in the initial contract signed on February 20, 2013, which showed the following labor costs relating solely to the flooring:

Remove existing parque flooring	\$ 550.00
Install 1100 s.f. of wood flooring	\$ 2,200.00
Trash removal/dump fee	\$ 450.00
Install baseboard on all flooring	<u>\$ 880.00</u>
Total	\$ 4,080.00

The Claimant was responsible for purchasing the flooring materials, which was an inherent part of the contract. The Lumber Liquidator invoices showed the following purchases of flooring materials the Respondent directed the Claimant to purchase to complete the home improvement (CL. Ex. 3):

<u>Invoice date</u>	<u>Materials cost</u>
2/18/2013	\$ 4,558.17
3/6/2013	\$ 133.53
3/8/2013	\$ 221.61
3/20/2013	<u>\$ 82.10</u>
Total:	\$ 4,995.41

The total cost of labor and materials attributable to the flooring was \$9,075.41.

The Claimant provided documentation from Lumber Liquidators, the supplier of the flooring, explaining that the reason for the separation of the floorboards was improper installation

preparation, which was described in great detail in the correspondence between the Claimant and Lumber Liquidators. The instructions included with the flooring indicated that the cement floor on which the flooring was to be installed required preparation that the Respondent failed to do, such as using a moisture barrier and a proper adhesive. Failure to follow those instructions caused the flooring to be installed in an unworkmanlike, inadequate or incomplete manner.

Accordingly, all of the existing flooring has to be removed, and the cement floor has to be properly prepared with the required installation material so that new flooring can be installed.

I thus find that the Claimant is eligible for compensation from the Fund.

IV. Actual loss

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 provided all of the documents that showed what work had to be done to repair the Respondent's unworkmanlike, inadequate or incomplete installation as well as the cost of materials to perform the repair. The Claimant provided three separate estimates, all of which matched the scope of the work contracted with the Respondent and would be necessary to remove the existing flooring and replace it with properly installed flooring. The estimate from Braz Flooring, LLC, comprised two components: labor of \$4,300.00 and materials of \$6,825.69, for a total of \$11,125.69. The estimate from Floormax was \$10,850.00. The estimate from Renaissance Floor and Carpet was \$17,550.00.

Using the middle-priced quote,² the actual loss is calculated as follows:

\$ 4,080.00	(Amount paid by the Claimant to the Respondent for labor), plus
\$ 4,995.41	(Amount paid by the Claimant to purchase the flooring materials on behalf of and at the direction of the Respondent), plus
<u>\$ 11,125.69</u>	(Fair market cost to make corrections and complete Contract work),
\$ 20,201.10	Subtotal
\$ (4,080.00)	(Labor cost per the contract)
<u>\$ (4,995.41)</u>	(Purchase of material)
\$ 11,125.69	Amount of the Claimant's actual loss.

Pursuant to the Business Regulation Article, 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. Bus. Reg. § 8-405 (e)(1), (5). Using the middle estimate, the actual loss computed above is \$11,125.69, which exceeds the amount paid by or on behalf of the Claimant to the Respondent of \$9,075.41. Even if I calculated the actual loss using the lowest estimate, the actual loss would still exceed the cost of the home improvement by almost \$1,775.00.

² Due to the ultimate conclusion, using any of these estimates in the calculation would lead to the same actual loss amount.

Accordingly, the Claimant is entitled to reimbursement from the Fund of only a portion of her actual loss, or \$9,075.41, the amount she paid to and on behalf of the Respondent. Bus. Reg. § 8-405 (e)(1).

CONCLUSIONS OF LAW

I conclude as a matter of law that the Claimant failed to prove that she sustained an actual loss compensable by the Fund as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a) and 8-407(e)(1) (2015); COMAR 09.08.03.03A(3).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$9,075.41; 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,³ and

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

May 10, 2016
Date Decision Issued

MN/sm
#162340

Signature on File

Marc Nachman
Administrative Law Judge

³ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 27th day of June, 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.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION