

IN THE MATTER OF THE CLAIM

OF HOLLY GARDINER,

CLAIMANT

AGAINST THE MARYLAND HOME

IMPROVEMENT GUARANTY FUND

FOR THE ALLEGED ACTS OR

OMISSIONS OF WILLIAM

GALLEHER, T/A

B & B EXTERIORS, LLC,

RESPONDENT

* BEFORE TARA K. LEHNER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-15-42745
* MHIC No.: 16 (05) 248
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PROPOSED DECISION

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STATEMENT OF THE CASE

On October 19, 2015, Holly Gardiner (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$3,045.00 in alleged actual losses suffered as a result of a home improvement contract with William Galleher, trading as B & B Exteriors, LLC (Respondent).

I held a hearing on April 13, 2016 at the Office of Administrative Hearings (OAH) in Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant appeared and represented herself. The Respondent did not appear for the hearing. Kris M. King, 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.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions of the Respondent?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 - Undeliverable Mail returned to OAH on March 4, 2016
- GF Ex. 2 - Hearing Order, December 3, 2015
- GF Ex. 3 - MHIC Licensing Information for the Respondent, undated
- GF Ex. 4 - Real Property Search for 7108 Sugrue Court, undated
- GF Ex. 5 - Home Improvement Claim Form, October 19, 2015
- GF Ex. 6 - Letter to the Respondent, October 20, 2015

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

- Cl. Ex. 1 - Contract, February 20, 2015
- Cl. Ex. 2 - Cancelled check to the Respondent (#686) for \$3,045.00, March 24, 2015
- Cl. Ex. 3 - Claimant's AT&T phone bill, May through August 2015
- Cl. Ex. 4 - Text messages between the Claimant and Respondent, undated

No documents were admitted on behalf of the Respondent.

Testimony

The Claimant testified on her own behalf and presented the testimony of Anthony Schreiber, a former employee of B & B Exteriors, LLC.

The Respondent was not present to testify or present witnesses.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject matter of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 104593. The Respondent traded as B & B Exteriors.
2. On or about March 24, 2015, the Claimant and the Respondent entered into a contract to remove and replace nine existing windows at the Claimant's home in Montgomery County, Maryland (Contract). The Contract stated that work would begin in six to ten weeks and would take one day to complete. The Contract price was \$7,155.00.
3. On March 24, 2015, the Claimant mailed to the Respondent the signed Contract and a check for \$3,045.00.
4. On March 27, 2015, the Respondent cashed the Claimant's check.
5. Despite the Claimant making many demands that the Respondent perform the Contract work between May and August 2015, the Respondent never performed any of the work under the Contract.

6. As of April 13, 2016, the Claimant did not receive any materials from the Respondent or any reimbursement of money from the Respondent.
7. On October 19, 2015, the Claimant filed the Claim for \$3,045.00 with the Fund.
8. On February 5, 2016, the OAH mailed a Notice of Hearing (Notice) by United States Postal Service (USPS) Certified Mail Return Receipt to all parties at their address of record.
9. The Respondent's address of record is 7108 Sugrue Court, Upper Marlboro, Maryland 20772. The Respondent provided this address to the MHIC as both his home and business address.
10. The Notice mailed to the Respondent was returned to the OAH by the USPS as undeliverable on March 4, 2016.
11. There was no request made to the OAH for postponement of the April 13, 2016 hearing.
12. The Claimant is not: a spouse or other immediate relative of the Respondent; an employee, officer, or partner of the Respondent; or an immediate relative of an employee, officer, or partner of the Respondent.
13. The Contract does not contain an arbitration clause.
14. The residence where the Contract work was to be completed is one of two residential properties owned by the Claimant.
15. The Claimant has not taken any action to recover monies from the Respondent other than the instant Claim.

DISCUSSION

Respondent's Failure to Appear

On February 5, 2016, the OAH mailed a Notice to the Respondent via USPS Certified Mail Return Receipt that stated a hearing would be held on the Claim on April 13, 2016 at 10:00 a.m. at the OAH, 10400 Connecticut Avenue, Suite 208, Kensington, Maryland (OAH Kensington). The Notice was mailed to the Respondent at his address of record with the MHIC. The USPS returned the Respondent's Notice to the OAH as undeliverable.

On April 13, 2016, at 10:00 a.m. I convened a hearing in this case at the OAH Kensington. By 10:20 a.m., neither the Respondent, nor anyone claiming to represent him, appeared for the hearing. The OAH received no request for postponement of the hearing. I determined that the Respondent was properly notified but failed to appear for the hearing. As a result, I found it appropriate to proceed with the hearing in the Respondent's absence.

The Claim

An owner bears the burden of proof, by a preponderance of the evidence, that they are entitled to an award from the Fund. Md. Code Ann., Bus. Reg. § 8-407(e); COMAR 09.08.03.03A(3); Md. Code Ann., State Gov't § 10-217 (2014). An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor" Md. Code Ann., Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for 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." Md. Code Ann., Bus. Reg. § 8-401. However, 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), and may not compensate a claimant for more than was paid to the original contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5).

In addition, an owner must prove that at all relevant times: (a) the owner owned fewer than three dwelling places or resides in the home as to which the claim is made; (b) the owner was not an employee, officer or partner of the contractor or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the owner did not unreasonably reject the contractor's good faith effort to resolve the claim; (e) any remedial work was done by licensed contractors; (f) the owner complied with any contractual arbitration clause before seeking compensation from the Fund; (g) there is no pending claim for the same loss in any court of competent jurisdiction and the owner did not recover for the actual loss from any source; and (h) the owner filed the claim with the MHIC within three years of the date the owner knew or with reasonable diligence should have known of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g); 8-408(b)(1) and (2).

The Claimant and the Fund agree that the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant, and that the Respondent's registered trade name with the MHIC is B & B Exteriors, LLC. In addition, the Claimant presented the following uncontroverted evidence: the Claimant owns fewer than three dwelling places; she is not an employee, officer or partner (past or present) of the Respondent; she is not an immediate relative of the Respondent, his spouse or any of his partners, officers or employees; she

has not recovered for the Respondent's acts or omissions from any other source; and there are no actions or claims for the Respondent's acts or omissions pending in any court of competent jurisdiction or with any other source of recovery.

The Claimant presented evidence that the Claimant and the Respondent entered into a legally binding contract. The Claimant explained that, in February 2015, she met with Anthony Schreiber, an employee of the Respondent, to discuss some window repairs at her home. She stated that she received from the Respondent a document on B & B Exteriors letterhead titled "Customer Agreement," and that the document provided for the removal and replacement of nine windows at the Claimant's residence, including the building of the new windows, for a price of \$7,155.00. The Claimant stated that, as instructed by Mr. Schreiber, she signed the document on March 24, 2015, and mailed it back to the Respondent with a check for \$3,045.00. She presented evidence that the check was cashed on March 27, 2015 with the endorsement of "B & B Exteriors." She also offered the Customer Agreement into evidence.

Anthony Schreiber, a previous employee of B & B Exteriors, testified on the Claimant's behalf. He confirmed that, while employed by the Respondent, he met with the Claimant in February 2015 and provided her with an estimate for the removal and replacement of nine windows. He also confirmed that he emailed the Customer Agreement to her and instructed her to sign it and return it, along with a check, to B & B Exteriors. He explained that the document he emailed to the Claimant is B & B Exteriors' form contract.

The Customer Agreement, admitted into evidence as Claimant's exhibit 1, constitutes a contract. It provides for the scope of work as described by both the Claimant and Mr. Schreiber and a price for this work. The document states that the "approximate start date" for the work is "6-10 weeks" and that the work would take one day to complete. It provides a line for the

signature of a “buyer” and on the line under the word “Contractor” is Mr. Schreiber’s typed name. The document contains numerous internal references to itself as a “contract” and it contains many boilerplate contract clauses, including the buyer’s right to rescind or cancel “this contract.” It does not contain an arbitration clause.

Despite there being a contract between the Claimant and the Respondent, and despite the Respondent cashing the \$3,045.00 check from the Claimant, the Respondent never completed any work under the Contract. The Contract states that the work would be completed by the Respondent within ten weeks. The Respondent cashed the Claimant’s check on March 27, 2015. Ten week from that date is June 5, 2015. The Claimant testified that she attempted many times to have the Respondent begin the work under the Contract, but that the Respondent had many excuses for delaying, including weather, the illness of employees, and family medical issues. She also testified that the Respondent was often nonresponsive to her, and offered her phone records into evidence indicating she made thirteen calls to the Respondent between May 13, 2015 and August 3, 2015, and that the Respondent only returned her call twice. The Claimant testified that the Respondent eventually agreed to begin the work on August 4, 2015; however, no one showed up on that date to perform the work. Text messages between the Claimant and the Respondent demonstrate that after the Respondent failed to perform the work on August 4, 2015, the Claimant demanded the Respondent to return her money. The text messages further document that the Respondent agreed to do so, even going so far as to tell the Claimant that he put a check in the mail to her; however, the Claimant testified at the hearing that she never received any reimbursement from the Respondent. Finally, she stated that, as of that date, she had not received any windows or other materials from the Respondent.

Mr. Schreiber corroborated the Claimant's testimony regarding the unresponsiveness of the Respondent. He stated that, when he left his employment with the Respondent sometime in the summer of 2015, the Respondent had many clients who were unhappy because their contracts were not being completed in a timely manner.

Based on the above, I find that the Respondent abandoned his Contract with the Claimant, and thus, the Claimant is eligible for an award from the Fund for the "actual loss" she suffered as a result of an "incomplete home improvement" by a licensed contractor. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(a).

The Claimant makes a demand solely for the \$3,045.00 she paid to the Respondent for the Contract work. COMAR 09.08.03.03B(3)(a) and section 8-405 of the Business Regulation article collectively provide that if a contractor abandoned the contract without doing any work, a claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract, up to the statutory cap of \$20,000.00. The Respondent never performed any work under the Contract and did not provide the Claimant with any material. Accordingly, the Claimant is entitled to reimbursement from the Fund in the amount of \$3,045.00.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss \$3,045.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(a).

RECOMMENDED ORDER

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


ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$3,045.00; 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;¹ and

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

May 10, 2016
Date Decision Issued

Signature on File

Tara K. Lehner 
Administrative Law Judge

TKL/sw
#162044

¹ 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