

| | |
|-------------------------------------|---------------------------------------|
| IN THE MATTER OF THE CLAIM | * BEFORE NANCY E. PAIGE, |
| OF JESSICA PERRY, | * AN ADMINISTRATIVE LAW JUDGE |
| CLAIMANT | * OF THE MARYLAND OFFICE |
| AGAINST THE MARYLAND HOME | * OF ADMINISTRATIVE HEARINGS |
| IMPROVEMENT GUARANTY FUND | * |
| FOR THE ALLEGED ACTS OR | * |
| OMISSIONS OF FARUK YILDIRIM, | * |
| T/A BELTWAY KITCHEN AND | * OAH No.: DLR-HIC-02-17-19220 |
| BATH, LLC, | * MHIC No.: 16 (05) 671 |
| RESPONDENT | * |

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On May 3, 2017, Jessica Perry (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$12,620.00 in actual losses allegedly suffered as a result of a home improvement contract with Faruk Yildirim, trading as Beltway Kitchen and Bath, LLC (Respondent).

I held a hearing on September 22, 2017 at the County Office Building in Landover, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). The Claimant represented herself. Eric London, Assistant Attorney General, Department of Labor, Licensing, and Regulation

(Department), represented the Fund. After waiting at least fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.¹

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, 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 & Supp. 2017); COMAR 09.01.03; COMAR 28.02.01.

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

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

- Cl. # 1. March 8, 2015 contract between the Claimant and Respondent
- Cl. # 2. A & B. Photographs
- Cl. # 3. A – F. Photographs
- Cl. # 4. A & B. Photographs
- Cl. # 5. A – C. Photographs
- Cl. # 6. A – J. Photographs
- Cl. # 7. Undated, unsigned estimate, Penwin Windows & Doors

¹ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on [date], COMAR 09.08.03.03A(2), and not returned [as unclaimed/undeliverable on [date]]. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter.]

I admitted the following exhibits on behalf of the Fund:

GF # 1. July 17, 2017 Notice of Hearing with attached certified mail receipts

GF # 2. June 20, 2017 Hearing Order

GF # 3. July 31, 2017 letter from MHIC "To Whom It May Concern"

GF # 4. May 3, 2017 Home Improvement Claim Form

GF # 5. May 10, 2017 letter to Respondent from MHIC

GF # 6. November 19, 2015 Complaint Form

Testimony

The Claimant testified in her own behalf. No other witnesses 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 01-109270-05-132318.
2. On March 8, 2015, the Claimant and the Respondent entered into a contract to remodel the Claimant's kitchen. The contract included removing and replacing cabinets; granite countertop; new sink and faucet and new tile floor and painting kitchen and dining area.
3. The original agreed-upon contract price was \$13,300.00. The Claimant agreed to an additional \$650.00 for taller cabinets.
4. The Respondent began work on March 30, 2015. The tile floor installation began on April 1, 2015 and was complete as of April 3, 2015.
5. Shortly after the floor was finished, several floor tiles cracked. The Respondent determined that the cause of the cracking was that the subfloor was unstable and did not provide sufficient support for the tile floor.

6. The Respondent offered to repair the floor in June 2015, but never returned to perform the repair work.

7. The Claimant paid a friend, who is a licensed home improvement contractor, \$250.00 to cover a hole cut by the Respondent's representative in order to view the underlying floor support, and to replace about two rows of cracked tile. The repair work amounted to about one sixth of the floor, which is estimated to total about ninety-six square feet.

8. The Respondent completed cabinet installation, installed a granite countertop, new sink and faucet, and completed the painting called for in his contract. He failed to install shoe moldings and outlet plates. Some other trim was poorly installed.

9. The Claimant paid the Respondent \$12,620.00.

10. The Claimant's actual loss is \$416.00.

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).² "[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 (3d 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." Md. Code Ann., Bus. Reg. § 8-405(a) (2015);³ see also COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a

² As noted above, "COMAR" refers to the Code of Maryland Regulations.

³ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume of the Maryland Annotated Code.

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 proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The Respondent performed unworkmanlike and incomplete home improvements.

The Claimant testified that the Respondent began work on March 30, 2015. The tile floor was installed between April 1 and 3, 2015. Cracks in the tile appeared shortly thereafter. The Claimant notified the Respondent of the cracking on April 23, 2017 and he advised that he would send someone to look at the problem. On May 25, 2015, someone sent by the Respondent came to check on the cause of the cracked tile. He removed several cracked tiles and cut a hole in the subfloor to view the structural support. He also jumped on the floor to demonstrate its instability. He attributed the cause of the cracking to insufficient floor support and suggested the tile be removed, the supporting structure be reinforced, and the tile replaced. He left the hole in the floor and the debris caused by removing the cracked tiles and cutting the subfloor.

On May 30, 2015, the person who installed the tile came out and offered the same explanation. Shortly thereafter, the Respondent told the Claimant that reinforcing the support for the subfloor was not part of his contract and she would need to pay extra to have that done. He subsequently told the Claimant that he wanted her to be happy and he would “figure something out.” On or about June 5, 2015, the Respondent advised the Claimant that he would be sending someone to remove the tiles, reinforce the floor support, and install new tile. No one ever came.

The Claimant also testified that the Respondent failed to replace shoe moldings under the new base cabinets, did not install plates over outlets (the outlets are in place and visible in

photographs) and that some cabinet trim was improperly installed. These alleged deficiencies in the trim are not visible in the photographs the Claimant provided and her description was not specific. Her main concern, however, was the cracked tile flooring.

The Claimant provided a detailed narrative of her contacts with the Respondent and photographs of the floor in her kitchen. Based upon the reports of the Respondent's representatives and the Respondent's advice that the support for the floor required reinforcement, I find that the Respondent performed an unworkmanlike home improvement by installing a tile floor over a subfloor that did not have sufficient structural support to carry its weight. The lack of support was readily apparent to the person who investigated the problem on the Respondent's behalf. I find that the Respondent should have determined before he installed the tile whether the existing floor was sufficiently stable to support additional weight.

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

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).

The Claimant offered an estimate from Penwin Windows & Doors for the lump sum of \$11,215.00 to remove the tile, reinforce the supporting structure, and retile the floor, as well as install outlet plates. The estimate is not itemized. The Claimant also testified that a friend, who is a licensed home improvement contractor, did her a favor and performed a partial repair of the area demolished by the person sent by the Respondent to evaluate the problem, including covering the hole and replacing tile. He charged \$250.00, which the Claimant paid.

MHIC's regulations provide the following three formulas for measurement of a claimant's actual loss, unless a unique measurement is necessary:

If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

COMAR 09.08.03.03B(3)(a).

If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

COMAR 09.08.03.03B(3)(b).

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 first formula is inappropriate because the Respondent did not abandon the contract. I cannot apply the second formula because the Claimant did not offer any evidence of the value of the labor and materials provided by the Respondent. The Respondent performed substantial work under the contract, including installing new cabinetry, a new sink and a granite countertop, and painting. There is no evidence in the record from which I can infer the value of that work. The original contract price is not itemized and I cannot determine what portion of the contract price is attributable to the floor.

As to the third formula, the Fund objected to the Penwin estimate for replacing the floor, which amounts to more than eighty percent of the original contract price, as unreasonably high. As noted, the Respondent provided substantial labor and materials in addition to replacing the

floor. It is unclear whether his contract included reinforcing the floor support, if necessary.⁴

While a contractor asked to correct the Respondent's work is likely to charge a premium, and assuming, without deciding, that reinforcement of the floor support was part of the Respondent's contract, the estimate does not provide sufficient information to justify a conclusion that the cost of repairing the floor and reinforcing the structural support will amount to eighty percent of the original contract price. Therefore, without an explanation of the basis for the repair estimate, I decline to use it to apply the third formula.

Since it is clear that the Claimant is entitled to compensation for the unworkmanlike performance of the Respondent, particularly his installation of a tile floor over an unstable subfloor, I will quantify her loss based upon the available evidence. The Claimant's friend charged her \$250.00 to replace what appears from the photographs to be two rows of tile and to patch the hole. The friend used tile that was left over from the Respondent's work, so there was apparently no cost for tile included in that charge. There are no dimensions for the floor in the record. Based upon the photographs, a rough estimate of the area repaired is about one sixth of the floor. Six times \$250.00 is \$1,500.00. Adding a ten percent premium for a new contractor to repair the Respondent's work (and the possibility that the Claimant's friend charged her less than the market price for his work) would increase the cost to \$1,650.00. Unfortunately, there is no evidence whatever as to the cost of materials. It appears from the photographs that the floor area is about twelve feet by eight feet, or ninety-six square feet (assuming the tiles are 12" x 24"). The Claimant had the burden to prove the amount of her loss and without any such evidence, I will recommend minimum compensation of \$1.00 per square foot for tile, or \$96.00. I have no information upon which to estimate the cost of demolition and debris removal or the cost of other materials, such as underlayment, grout and adhesive, although it appears that at least some of

⁴ The contract included "installing tile support" and "installing cement board." It is unclear whether these items were meant to include structural reinforcement of the subfloor, if necessary. According to the Claimant, the Respondent denied that such work was included in his contract.

those costs would have been included in the amount charged by the Claimant's friend. I cannot, therefore, recommend an amount to reimburse the Claimant for any such additional costs.

The Claimant withheld \$1,330.00 of the original contract price. She is therefore entitled to reimbursement of at least \$320.00 (\$1,650.00 minus \$1,330.00) plus \$96.00 for new tile, or a total of \$416.00 for replacement of the tile floor.

As to the cost of reinforcing the floor support, even if I assume that the Respondent was responsible for doing so under his contract, there is no evidence whatever of the cost. The only relevant evidence is the Claimant's testimony that she was told that the supporting beams under the kitchen floor are too far apart and additional 2" x 4" beams are necessary. There was no indication of how many additional beams were needed or how much it would cost to install them. I cannot, therefore, make any recommendation for an award to cover that loss.

The cost for installing cover plates on the existing outlets is apparently nominal. There is no evidence from which to infer the cost of installing shoe moldings or repairing other alleged deficiencies in the trim (the Claimant testified that the shoe moldings themselves are at her home). I will therefore recommend an award from the Fund of \$416.00 for replacing the tile floor, only.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015). I further conclude that the amount of that loss is \$416.00. COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$416.00; 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 ten percent (10%) as set by the Maryland Home Improvement Commission;⁵ and

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

Signature on File

December 1, 2017
Date Decision Issued

Nancy E. Paige
Administrative Law Judge

NEP/emh
170844

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 2nd day of February, 2018, 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.

Andrew Snyder

***Andrew Snyder
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION