

IN THE MATTER OF THE CLAIM
OF JONI RAINBOLT,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF FRED BERGER t/a
FRED BERGER DESIGN & BUILD,
RESPONDENT

* BEFORE KIMBERLY FARRELL,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-16-21536
* MHIC No.: 16 (05) 862
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PROPOSED DECISION

STATEMENT OF THE CASE
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DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On May 2, 2016, Joni Rainbolt (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$11,717.69¹ in alleged actual losses suffered as a result of a home improvement contract with Fred Berger trading as Fred Berger Design and Build (Respondent).

¹ The reimbursement request was amended at the hearing to \$11,765.97. I found, pursuant to Code of Maryland Regulations (COMAR) 09.08.03.02C(2), that the modest change requested would not "prejudice the contractor whose conduct gave rise to the claim."

I held a hearing on October 26, 2016, at the Office of Administrative Hearings' (OAH) Kensington office located at 10400 Connecticut Avenue, Suite 208, Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented herself. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent failed to appear and after waiting more than fifteen minutes with neither the Respondent nor anybody authorized to represent him appearing, I proceeded with the hearing. COMAR 28.02.01.23A.²

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, and the hearing regulations for both the Department and the Office of Administrative Hearings (OAH). Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); 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:

CLMT #1 Packet of roughly 89 pages of documents in support of the claim, including:

- MHIC Complaint Form, January 5, 2016, with attachments, including a statement dated January 5, 2016; correspondence with the Montgomery County Office of Consumer Protection (OCP) dated August 31, 2015; receipts; Complaint form for the OCP, July 12, 2015, with attachments;

² On July 27, 2016, notice of the hearing was sent by certified mail to the Respondent's address on file with the MHIC. COMAR 09.08.03.03A(2). It was returned to the OAH by the United States Postal Service (USPS) as unclaimed. Notice sent by regular mail was not returned to the OAH by the USPS. The address used for both notices is the Respondent's address of record with the MHIC and it is also his current address on record with the Maryland Motor Vehicle Administration for his valid Maryland license. Fund #4.

Home Improvement contract and related documents; notes Claimant kept on payments made; email between the Claimant and the Respondent, various dates in 2012, 2013, and undated; email correspondence between the Claimant and the OCP, various dates in July and September 2015; letter from the OCP to the Respondent, September 24, 2015, with attachments; email correspondence between the Claimant and OCP, various dates in September 2015; email from OCP to the Claimant conveying a response from the Respondent to the OCP regarding the Claimant's complaint with OCP, October 5, 2015; email correspondence between the Claimant and the OCP, various dates in October 2015; email correspondence to, from, or incorporating correspondence to or from OCP, the Claimant and the Respondent, various dates in November 2015; records documenting checks written to the Respondent, various dates 2012-2015; email from the Claimant to the OCP, January 5, 2016

CLMT #2 Home Improvement Claim Form, dated April 28, 2016, filed with the MHIC May 2, 2016, with attachments including: Claimant's statement, April 23, 2016; estimates from Ferguson Bath, Kitchen, & Lighting Gallery (April 15, 2016), Rusty Stewart's Renovations LLC (April 12, 2016), Moyers Lawn Service & Landscaping (March 12, 2016), and The Tile Shop (April 15, 2016)

The Respondent was not present to offer any exhibits.

I admitted the following exhibits on behalf of the Fund:

- FUND #1 Notice of Hearing, July 27, 2016, sent certified mail, return receipt requested, returned to the OAH by the USPS as unclaimed August 22, 2016
- FUND #2 Hearing Order, June 21, 2016
- FUND #3 MHIC licensing information for the Respondent, printed October 25, 2016
- FUND #4 Affidavit of Kevin Neibuhr, October 25, 2016
- FUND #5 Home Improvement Claim Form, dated April 28, 2016, filed with the MHIC May 2, 2016
- FUND #6 Letter from the MHIC to the Respondent, May 19, 2016

Testimony

The Claimant testified on her own behalf. No other witness was called by any party.

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 home improvement contractor licensed by the MHIC.
2. On or about August 28, 2010, the Claimant and the Respondent entered into a home improvement contract under which the Respondent was to undertake a major renovation of the Claimant's home, including, but not limited to: taking out the back wall of the house and building new rooms in a one-story addition to the back, roofing the entire existing house as well as the addition, putting siding on the first floor addition and the second floor of the entire house, foundation work, floor and wall framing, ceiling and roof framing, insulation, window and door installation, drywall installation, floor coverings, tiling, kitchen cabinet installation, fixtures, and bathroom work. The contract included the demolition work to start the project through cleanup and yard restoration necessitated by the construction.
3. The contract stated that work would begin approximately between October 30 and November 15, 2010, and would be completed by approximately February 31, 2011.³
4. The original agreed-upon contract price was \$151,989.97. During the course of work under the contract, the Claimant upgraded certain features, with accompanying related costs, and the Respondent added charges for things which the Claimant believed were covered under the original contract. The changes or additions to the original contract totaled \$32,089.84, bringing the adjusted total for the contract to \$184,079.81.
5. Work did not start on the contract until February 2011 and proceeded slowly. Approximately one year later, the Respondent was still working on the original contract and the

³ Most years February has twenty-eight days and in leap years it has twenty-nine, but it is clear that construction was to be completed around the end of February or very beginning of March 2011.

Claimant thought he was doing a great job, although she wished the project were proceeding more expeditiously.

6. On or about September 12, 2012, although work on the first contract was not complete, the Claimant believed that the work was going well and she and the Respondent entered into a second contract for home improvement. This second contract called for the Respondent to build a deck, provide fencing for the property, do concrete and railing work, install a storm door, and extensively work on two bathrooms. The contract did not state approximate starting or ending dates for the work.

7. The original agreed-upon contract price for this second contract was \$36,920.20.

8. The Respondent completed many of the requirements of the contracts.

9. The Respondent had anywhere from two to six workers on site when work was being done. In between the periods of work, there were periods of weeks or months when no work was done by the Respondent.

10. In these periods where no work was occurring, the Claimant called the Respondent, he would promise to return to do more work and he would actually return and perform more work.

11. This cycle of periods of inactivity on the project coupled with phone calls from the Claimant to get work started again happened repeatedly.

12. At some point in early 2015, the Respondent advised the Claimant that he and a partner were forming a new company called The Renoman. After that, it became more difficult to reach the Respondent. He would not answer his phone or would take days to respond. On multiple occasions he promised to complete the work on the contracts including picking up the trash that remained in the Claimant's yard. The Respondent did not come back to finish the work.

13. The Respondent last did work related to the contracts on April 9, 2015.

14. The Claimant continued to try to contact the Respondent and demand that he complete the contract, but he did not respond, or when he did he did not actually come to do any further work. He made statements to the Claimant such as, "let me check into it," "I'll get to it," or "I'll get back to you."

15. The Claimant filed a complaint with the Montgomery County OCP. For approximately five months, that office attempted to work with the parties to resolve the matter. The process was not successful.

16. After filing the complaint with OCP, the Claimant stopped trying to contact the Respondent other than through the OCP. She was instructed to let the OCP act as an intermediary between the parties.

17. There is work called for by the original contracts which the Respondent did not complete, or did not complete satisfactorily. For example, the Respondent took a deposit on a living room window but failed to deliver or install a new window in the living room. He did not complete the master bath, including installing a new vanity with granite, replacing an unapproved wall cabinet which has already fallen apart, and properly completing work on the sink and fixtures. The Respondent took a deposit on a storm door which he did not deliver or install. The Respondent left trash, such as an old toilet, in the Claimant's yard for an extended period of time. Eventually the Claimant paid to have it removed. The Respondent agreed to seed the yard to help it recover from construction-related damage. He has failed to do so. The sub-floor in the downstairs bathroom is not level, which causes floor tile to raise and become unglued. A first attempt to fix the problem by simply re-gluing the tiles was unsuccessful. The sub-floor will need to be replaced and made level to cure this problem. There is a panel missing

in the kitchen. The Respondent did not complete necessary caulking and painting called for in the contracts.

18. The Claimant hired others to complete some of the work called for in the contract but left undone by the Respondent. She obtained estimates from other contractors to restore, replace, repair or complete unworkmanlike, inadequate, or incomplete work by the Respondent.

19. The total for the first contract, as adjusted, plus the second contract is \$221,000.01.

20. In total, the Claimant paid the Respondent \$220,217.94 on the two contracts. The Respondent has not refunded any money to the Claimant.

21. It has cost or will cost the Claimant \$12,548.04 to complete or correct the work called for under her contracts with the Respondent.⁴

22. The Claimant's actual loss is \$11,765.97.

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). "[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).

⁴ This sum represents the total of the estimates presented by the Claimant in CLMT #2 plus \$100.00 for the trash removal plus \$263.00 which the Appellant paid for a door (in addition to the deposit she had already given the Respondent), less \$25.00 for what the Claimant referred to as a "door closer." The Claimant paid \$475.00 to a Mr. Gomez to do some work for her. Initially he worked for the Respondent. Mr. Gomez later told the Claimant he no longer worked for the Respondent and that he was trying to start his own company. After the Respondent stopped work on the project, the Claimant hired Mr. Gomez to do some work for her. There is no evidence that Mr. Gomez was a licensed home improvement contractor, therefore I have not included his labor fees in the calculation.

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);⁵ *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. 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.

Further, the Respondent performed inadequate or incomplete home improvements. The contracts in this case, particularly the first one, involved large-scale renovation of the Claimant’s home. Although the Respondent worked slowly, he worked well, accomplishing many of the complex tasks required by the contract. At the end, though, he simply refused to finish the things that remained to be done under the contract. The Claimant was more than patient. A project that was supposed to be completed by late February or early March 2011 did not even start until February 2011. Two years after the signing of the original contract, the project that was supposed to take four months was still not complete, but the Claimant was pleased with the quality of the Respondent’s work and she entered into a new contract with him for additional home improvements. She coaxed and prodded and cajoled the Respondent over a period of years and he consistently responded by returning and performing additional work.

⁵ All references to the Business Regulation Article are to the 2015 Volume.

It was not until spring 2015 that the Respondent simply stopped responding. Although there was still work to be finished, the Respondent would not answer his phone, would allow lengthy gaps between when he received and when he returned messages, and he made promises about when he would appear that he did not keep. The Claimant, weary of a home improvement project still not finished after more than four years, realized that the Respondent did not intend to complete the contract. She contacted Montgomery County's OCP. OCP staff tried to find an amicable solution to the dispute, but the process was not successful. The Claimant then filed her HIC claim.

I thus find that the Claimant is eligible for compensation from the Fund. Before I discuss the specifics of an award, I will briefly detour to discuss the statute of limitations in this type of case. The Business Regulation Article provides: "A claim shall be brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." Md. Code Ann., Bus. Reg. § 8-405. Upon hearing that the Claimant filed a claim in 2016 related to a contract signed in 2010, it would seem that the statute of limitations might bar the claim. After hearing the Claimant's testimony, however, I find that her 2016 filing was within the three-year period after which she discovered, or should have discovered her loss.

The Claimant's testimony was highly persuasive. She had a very earnest presentation, supported by documentation gathered over a lengthy period of time. When she did not know something, she plainly stated that to be the case. The notes she kept regarding payments, in evidence as part of CLMT #1, are meticulous. The Fund noted in closing argument that it found the Claimant to be very credible, based in part on the notes she had kept about the interplay involved in this case. I also found her demeanor to be appropriate for the testimony she gave.

She was serious and gave the impression that it was important to her to accurately and fairly offer information and testimony.

Despite the years dragging on, the Respondent conditioned the Claimant to expect that he would simply work slowly. He would leave big gaps in the time between when he appeared at the Claimant's home to perform home improvement, but when she contacted him and prodded him, he would state that he was coming back and then he would in fact appear with a crew of workers and complete additional tasks required by the contract. He kept up this pattern until the spring of 2015. At that point there was a distinct shift in the Respondent's communication with the Claimant. He became harder to reach and started making promises which he no longer kept. Within a few months, the Claimant took action, first with the Montgomery County OCP and later with the MHIC. The Claimant's claim is not barred by the statute of limitations because she filed her claim within three years of when she discovered, or should have discovered, her loss.

Having found eligibility for compensation I now turn to the amount of the award 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 paid \$220,217.94 to the Respondent.⁶ The Claimant has paid or will be required to pay an additional \$12,548.04 to repair and complete the original contracts. Taking the sum of those two numbers and subtracting original contract price yields the following calculation for the Claimant's actual loss:

	\$220,217.94	amount paid to Respondent under the contracts
+	<u>\$ 12,548.04</u>	additional monies to repair and complete contracts
	\$232,765.98	
-	<u>\$221,000.01</u>	combined prices of original two contracts
	\$ 11,765.97	actual loss

The law sets certain maximum limits on recovery from the Fund for a claim such as this (\$20,000.00), and also requires that the award not exceed the amount paid by a claimant to a respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (2015). The Claimant's actual loss is below the maximum cutoff and does not exceed amount paid by the Claimant to the Respondent. I will recommend an award in the full amount of the Claimant's actual loss.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss \$11,765.97 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)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$11,765.97; and

⁶ Using the cancelled checks in the file, I came up with a number that did not exactly match and was a modest amount less than this figure; however, I could see from the Claimant's notes on other documents, that at least one check was written to the Respondent but not included in evidence with the other cancelled checks. Based on my overall evaluation of the Claimant's credibility and the thoroughness of her notes on payments, I am finding credible and using the number she gave in her testimony as the amount she paid to the Respondent.

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;⁷ and

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

Signature on File

January 19, 2017
Date Decision Issued

Kimberly Farrel _____
Administrative Law Judge

KAF/sw
#166091

⁷ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 8th day of March, 2017, 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

