

**IN THE MATTER OF THE CLAIM
OF LUCY CHEN,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF
FARUK YILDIRIM, T/A
BELTWAY KITCHEN AND BATH,
LLC
RESPONDENT**

*** BEFORE JOHN T. HENDERSON, JR.,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-18-26780
* MHIC No.: 16 (05) 874.**

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RECOMMENDED DECISION

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STATEMENT OF THE CASE

On October 6, 2017, Lucy Chen (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for the reimbursement of \$30,468.74 of actual losses allegedly suffered because of a home improvement contract with Faruk Yildirim, t/a Beltway Kitchen and Bath, LLC (Respondent). Md. Code Ann., Bus. Reg.

§§ 8-401 through 8-411 (2015).¹ On August 22, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On September 20, 2018, the OAH mailed a notice of the hearing to the Respondent by certified and regular mail to his address of record on file with the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d) (2015).² The notice advised the Respondent of the time, place, and date of the hearing. On September 28, 2018, the United States Postal Service returned the green certified receipt evidencing the notice was received and signed by someone at the address of 20634 Muddy Harbour Square, Sterling, Virginia 20165, the Respondent's address of record. I determined there was adequate notice of the hearing provided to the Respondent.

I held the hearing on November 30, 2018, at the OAH, 10400 Connecticut Avenue, Suite 208, Kensington, Maryland 20895. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(a), and (e). The Claimant appeared and represented herself. Shara Hendler, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund.³ After waiting 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.⁴

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, 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 & Supp. 2018); COMAR 09.01.03; COMAR 09.08.02; COMAR 28.02.01.

¹ Unless otherwise indicated, all references are to the 2015 version.

² "The hearing notice to be given to the person shall be sent at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d) (2015).

³ Private citizen Susan Grodsky was observing the proceedings.

⁴ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on September 20, 2018, COMAR 09.08.03.03A(2), and not returned as unclaimed/undeliverable on September 28, 2018. 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.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund because of the Respondent's acts or omissions?
2. If so, how much is the Claimant entitled to receive from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted into evidence exhibits offered by the Claimant as follows:

- Cl. Ex. 1 Claimant's Summary of Events
- Cl. Ex. 2 Thirty photographs of home improvement work performed by the Respondent, undated
- Cl. Ex. 3 Contract between the Claimant and the Respondent, August 5, 2015
- Cl. Ex. 4 Canceled check number 150, payable to the Respondent, in the sum of \$11,000.00, August 5, 2015; canceled check number 103, payable to the Respondent, in the sum of \$6,000.00, September 12, 2015
- Cl. Ex. 5 Emails from the Respondent to the Claimant, August 23, 2016, November 21, 2018; Respondent's work description for home improvement, undated
- Cl. Ex. 6 Respondent's website advertisement, undated
- Cl. Ex. 7 Emails from the Respondent to the Claimant, November 14, 2018, January 5, 2016, September 23, 2015, November 19, 2018
- Cl. Ex. 8 Emails from the Claimant to the Respondent, January 7, 2016, November 21, 2018
- Cl. Ex. 9 Office of Consumer Protection (OCP) Closed Case Cover Sheet, December 4, 2015; Consumer Protection Complaint received by OCP, September 30, 2014; contract between Claimant and Respondent, August 2, 2015; canceled check number 150, payable to the Respondent, in the sum of \$11,000.00, August 5, 2015; canceled check number 103, payable to the Respondent, in the sum of \$6,000.00, September 12, 2015; UPS fax cover sheet, October 24, 2015; DLLR licensee information for Respondent; letter from OCP to the Respondent, October 5, 2015; Respondent's website advertisement; Respondent's license, expiring on January 31, 2017; DLLR Basic Business License of Respondent, May 13, 2015; Respondent's website advertisement; email from the Respondent to OCP, October 15, 2015; email from OCP to the Claimant, October 26, 2015; email from OCP to

the Claimant, November 5, 2015; email from the Claimant to OCP, November 9, 2015; contract between the Claimant and the Respondent, August 5, 2015; email from OCP to the Claimant, November 18, 2015; email from the Claimant to OCP, November 18, 2015; email from the Claimant to OCP, November 20, 2015; email from OCP to the Claimant, December 1, 2015; Letter from OCP to HIC, December 4, 2015; email from OCP to the Respondent, October 15, 30, 2015, November 20, 24 and 25, 2015, December 7, 2015; case notes prepared by OCP investigator, December 10, 2015

I admitted exhibits on behalf of the Fund as follows:

- GF Ex. 1 Hearing Order from HIC, August 17, 2018
- GF Ex. 2 Notice of Hearing, September 20, 2018
- GF Ex. 3 MHIC Claim Form, received by MHIC on October 6, 2017
- GF Ex. 4 DLLR license history of the Respondent as of October 31, 2018

Testimony

The Claimant testified on her own behalf. The Fund did not present any witness testimony.

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 contractor's license number 01-109270 and was trading as Beltway Kitchen and Bath, LLC, license number 05-132318.
2. The Claimant is not related to the Respondent.
3. The Claimant's property in this matter is located in Gaithersburg, Maryland (the Property).
4. The Property is the Claimant's primary residence.
5. On September 30, 2015, the Claimant filed a complaint with the Office of Consumer Protection (OCP).

6. The Claimant has not filed any other claims against the Respondent outside of these proceedings and the closed OCP proceeding.

7. In August 2015, the Claimant met with the Respondent to discuss the home improvement of remodeling her kitchen and two bathrooms at the Property.

8. On August 5, 2015, the Claimant and the Respondent signed a contract for home improvements to the Property.

9. The scope of the work pursuant to the August 5, 2015 contract was as follows:

Kitchen/Demolition

- Remove cabinets
- Remove countertops
- Remove sinks, faucets
- Remove appliances
- Cancel and cap off plumbing
- Remove fixtures
- Haul away debris

Cabinets

- Install kitchen cabinets
- Install pantry
- Install shoe moldings
- Install fillers
- Install toe kicks
- Install under mount sink
- Install faucet

Countertops

- Install granite countertops
- Polish
- Sealer applicant
- Sink cut out
- Edge standard

Backsplash

- Install kitchen backsplash
- Install grout
- Sealer

Electrical

- Install customer provided appliances
- Install customer's outlet cover plates
- Install customer's switch plates

Master Bathroom/Demolition

- Remove tub
- Remove toilet
- Remove wall tile
- Remove floor tile
- Remove vanity
- Remove vanity top
- Remove sink
- Remove fixtures
- Remove lighting fixtures
- Remove mirror
- Cancel and cap plumbing

Installations

- Install frameless glass shower doors
- Install wall tile
- Install floor tile
- Install shower floor
- Install tile tub surroundings
- Bathroom vanity
- Install sub floor
- Install vanity top
- Install vanity sink
- Install new shower head
- Install faucets

10. The total project cost pursuant to the August 5, 2015 contract was \$18,600.00.

11. The terms of payment pursuant to the August 5, 2015 contract were as follows:

- 50% initial down payment for materials
- 25% after cabinets delivered
- 15% after countertops are installed
- 10% final payment after job completion

12. The August 5, 2015 contract provided for the home improvement to begin when the materials were received and installation and completion to be twenty days thereafter, weather permitting. The estimated project start date was September 6, 2015.

13. The Claimant paid the Respondent for the home improvement, as follows:

<u>Check No.</u>	<u>Date</u>	<u>Payee</u>	<u>Amount</u>
150	August 5, 2015	Beltway Kitchen/Bath	\$11,000.00
103	September 12, 2015	Beltway Kitchen & Bath	<u>\$ 6,000.00</u>
Total			\$17,000.00

14. The Claimant and the Respondent orally agreed to amend the August 5, 2015 contract so an upstairs bathroom could be added. The total amount due then became \$22,000.00.

15. After the Respondent began to demolish the kitchen, he discovered mold behind the cabinets. The Respondent agreed to replace the kitchen drywall for an additional \$2,000.00.

16. The Claimant did not agree to pay an additional \$2,000.00 to replace the kitchen drywall.

17. On September 7, 2015, the Respondent stopped sending workers to the Property because he did not receive from the Claimant the additional \$2,000.00 for kitchen drywall replacement.

18. The Respondent did not return to the Property after September 7, 2015 to complete the agreed upon home improvement.

19. Although OCP made an effort to have the Respondent continue working on the home improvement, the Respondent did not return despite the Claimant not barring him from the Property.

20. On December 1, 2015, OCP referred the Claimant to HIC.

21. On December 4, 2015, the OCP case was closed without resolution.

22. On December 6, 2015, the Respondent offered to continue the Claimant's kitchen home improvement beginning December 10, 2015, yet he did not return to the Property. The Claimant did not deny the Respondent access to complete the home improvement.

23. On August 25, 2016, the Claimant received an estimate from KBR Kitchen & Bath for \$33,750.00 to repair and complete the home improvement at the Property.

24. The home improvement has not been completed by the Respondent or other contractor.

DISCUSSION

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available reserve of money from which homeowners could seek relief for actual losses sustained because of an unworkmanlike, inadequate, or incomplete home improvement performed by a licensed home improvement contractor. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411. Under this statutory scheme, licensed contractors are assessed fees, which subsidize the Fund. Homeowners who sustain losses by the actions of licensed contractors may seek reimbursement for their "actual losses" from this pool of money, subject to a maximum of the lesser of \$20,000.00 or the amount paid by or on behalf of the claimant to the contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5). A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a). When the Fund

reimburses a homeowner as a result of an actual loss caused by a licensed contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she reimburses the Fund in full with annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-411(a).

Recovery against the Fund is based on “actual loss,” as defined by statute and regulation. “[A]ctual 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. “By employing the word ‘means,’ as opposed to ‘includes,’ the legislature intended to limit the scope of ‘actual loss’ to the items listed in section 8-401.” *Brzowski v. Md. Home Improvement Comm’n*, 114 Md. App. 615, 629 (1997). The Fund may only compensate claimants for actual losses incurred as a result of misconduct by a licensed contractor. COMAR 09.08.03.03B(2). At a hearing on a claim, the Claimant has the burden of proving the validity of the 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 (3d ed. 2000).

There is no dispute that the Respondent held a valid contractor’s license in 2015 when he and his company entered into the Contract with the Claimant. Md. Code Ann., Bus. Reg. § 8-405(a). There is no dispute that the Claimant is the owner of the Property and that there is no procedural impediment barring her from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a), (f). The next issue is whether the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement due to misconduct, and if so, whether the

Respondent made good faith efforts to resolve the claim. A claim may be denied if the Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d). For the following reasons, I find that the Claimant has proven eligibility for compensation. In addition, the Respondent did not make any good faith efforts to resolve the claim.

The Claimant testified that she is the owner of the Property where she sought a home improvement and entered into contract with the Respondent on August 5, 2015. The contract itself provided for a fee of \$18,600.00. The Claimant testified that her request to add the upstairs bathroom resulted in the total home improvement fee to be \$22,000.00, which she agreed to pay.

The Claimant testified that, by September 12, 2015, she paid the Respondent a total of \$17,000.00 toward the contract price. According to the Claimant, \$500.00 of the payment was to be used to purchase a stove from Home Depot, which was not purchased.

The Claimant further testified that shortly after the Respondent began the home improvement he abandoned the home improvement on September 7, 2015 after she did not pay an additional \$2,000.00 to replace all of the kitchen drywall due to mold. The Claimant testified she did not deny the Respondent access to the property to complete the home improvement. The Respondent did not return to complete the work on and after September 7, 2015. The Respondent worked one day on the home improvement.

The Claimant's exhibits support the contract price and the efforts she made to have the Respondent complete the home improvement. Her photographs admitted into evidence clearly show the destruction and damage to the Property caused by the Respondent.

Pursuant to the Respondent abandoning the home improvement, the Claimant must secure a new contractor to repair and complete the home improvement. On August 25, 2016, the

Claimant received a proposal and estimate from KBR Kitchen & Bath for \$33,750.00 to repair and complete the home improvement abandoned by the Respondent.

The Fund argued that the credible evidence shows that the Claimant proved a loss by the acts or omissions of the Respondent and recommended an award to the Claimant from the Fund. The Fund further agreed that the Respondent abandoned the home improvement and that the Respondent performed in an unworkmanlike, inadequate and incomplete manner.

I agree. The Claimant sustained an actual monetary loss. She is eligible for compensation from the Fund. I now turn to the amount of the award, if any.

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 MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3) sets forth the various formulas for determining an "actual loss." I find the appropriate formula is the following:

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(c) 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.

Using the formula in COMAR 09.08.03.03B(3)(c), the following calculations apply:

\$17,000.00	Payments made to the Respondent by the Claimant under The August 5, 2015 Contract
<u>\$33,000.00</u>	The Amount required to pay KBR Kitchen and Bath to complete the home improvement
Total \$50,000.00	

Less \$22,000.00 The original August 5, 2015 contract price and oral addendum for upstairs bathroom

\$28,000.00 Considered as actual loss

The MHIC may not award from the Fund more than \$20,000.00 to one claimant for acts or omissions of one contractor or an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5). Since the claim exceeds \$20,000.00 and also exceeds the \$17,000.00 paid to the Respondent, the claim is limited to \$17,000.00.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual loss of \$17,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(e)(1) and (5); COMAR 09.08.03.03B(3)(a).

RECOMMENDED ORDER

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

ORDER that the Claimant sustained an actual loss; and

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$17,000.00; and


ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until he reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent as set by the Maryland Home Improvement Commission;⁵ and

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

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

February 26, 2019
Date Decision Issued

JTH/emh
#178437



John T. Henderson, Jr.
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 25th day of April, 2019, 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