

IN THE MATTER OF THE CLAIM	* BEFORE WILLIAM SOMERVILLE,
OF SHAMEEKA JONES,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ACTS OR	*
OMISSIONS ALLEGED AGAINST	* OAH No.: DLR-HIC-02-18-16793
MARVIN BAIZA GUZMAN,	* MHIC No.: 17 (90) 042
T/A BAIZA CONSTRUCTION, INC.,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On May 26, 2017, Shameeka Jones (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$9,485.59 for actual losses she alleged that she suffered as a result of a home improvement contract with Marvin Guzman Baiza, trading as Baiza Construction, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). Thereafter, the MHIC referred the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on August 24, 2018 at the Administrative Law Building in Hunt Valley. Bus. Reg. § 8-407(e). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented herself. After waiting about 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 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 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibit offered by the Claimant:

Clmt. Ex. 1 - Packet of documents, tabbed, but not numbered

I admitted the following exhibits offered by of the Fund:

Fund Ex. 1 - Notice and Hearing Order

Fund Ex. 2 - Licensing history

Fund Ex. 3 - Ten-day letter and attachments, 6-14-2017

¹ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on August 24, 2018, COMAR 09.08.03.03A(2). Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Md. Code Ann., Bus. Reg. §§ 8-407(a) and 8-312(h); COMAR 28.02.01.23A. I determined that the Respondent had been properly notified.

Testimony

The Claimant testified.

PROPOSED FINDINGS OF FACT

Upon considering demeanor evidence, testimony, and other evidence, I find the following facts by a preponderance of the evidence:

1. At all times relevant, the Respondent was licensed by the MHIC and held the license for Baiza Construction, Inc. (Company).
2. On October 24, 2015, the Claimant paid the Company \$1,200.00 by check no. 1595. (Clmt. Ex. 1.)
3. On October 25, 2015, the Claimant and the Company entered into a home improvement contract. The Claimant was to pay \$2,255.00 and the Company was to install a Pergo® flooring product and shoe molding on the first floor of the Claimant's residence. The Claimant was to supply all materials. The Company was also to paint two bedrooms. The Claimant was to supply primer and paint. The Company was to remove wall paper in a bathroom and paint the walls. The Claimant was to supply the paint. The Company was to remove existing door locks and install new ones. The Claimant was to supply the hardware. (Clmt. Ex. 1.)
4. Thereafter, the Claimant pointed out a soft spot in the subfloor where the flooring product was being laid and the Respondent, or employees of the Company, investigated.
5. At some point thereafter, the Claimant hired the Company to replace the kitchen floor with ceramic floor tiles. There was no written contract document.
6. At some point thereafter, the Claimant hired the Company to remedy with a support post a cracked piece in an open-web, engineered floor joist. There was no written contract document.

7. The Claimant paid the Company \$4,000.00 on November 6, 2015; \$1,000.00 on November 10, 2015, \$3,800.00 on November 23, 2015; and \$1,100.00 on November 24, 2015. (Clmt. Ex 1.)

8. By the end of November, 2015, the project was completed.

9. On December 21, 2015, the Claimant contacted the Company to complain that the laminate flooring was not “smooth” and that it had “some give.” The Claimant also complained that the floor tiles in the kitchen were not flat and level.

10. Eventually, floor tiles and some trim became loose.

11. On May 13, 2016, the Respondent inspected the project.

12. On June 2, 2016, the Claimant received a vague proposal by e-mail message from a company called “MCR Pro.” That company proposed to remove and reinstall the kitchen floor tiles, and to perform some carpentry work on an outdoor deck, for \$3,500.00.

13. On or about June 22, 2016, the Claimant filed a complaint with the MHIC.

14. On July 8, 2016, the Respondent suggested that the remedy would be to add additional supports to the floor joists in the basement and to remove and replace the kitchen floor tiles for an additional \$7,500.00.

15. On May 26, 2017, the Claimant filed a claim for \$9,485.59 against the Fund.

16. On August 2, 2018, the Claimant’s husband and Next Day Floors (MHIC Lic. No. 126074) signed a contract document by which the parties agreed that Next Day Floors would take up the laminate flooring, patch an area, take up the kitchen floor tiles, and install different flooring products, and the Claimant’s husband would pay \$6,002.31.

17. On August 5, 2018, Bowlin Home Improvements, LLC, offered the Claimant a remedial contract to remove and replace the laminate flooring and kitchen floor tiles. The contract document noted that labor would cost \$4,735.00 and noted that the amount of time/labor

to remove mortar on the kitchen floor would need to be “assessed” and charged on a “time/material basis.” That portion of the project was not included in the proposal.

18. On August 22, 2018, a remedial contractor, Luna, gave the Claimant a vague, one-page chart as a proposal to remove and replace the laminate flooring and the kitchen floor tiles, and to level the floor surface with lauan plywood. The price was \$6,246.34.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); Md. Code Ann., State Gov’t §10-217 (2014); COMAR 09.08.03.03A(3).²

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 licensed contractor”). “[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.

The Respondent was a licensed home improvement contractor, holding the license for the Company, at the time of the Contract with the Claimant. (Finding of Fact 1.) Within the project, the Respondent did many home improvement tasks that were workmanlike, adequate, and complete. (Fund Ex. 3.) There appear to be several, separate agreements, some not reduced to writing. The Respondent performed some of the home improvement work in an unworkmanlike, inadequate, or incomplete manner. The Pergo® flooring product that the Respondent laid began springing up soon after it was laid. The repair to the cracked web joist was inadequate and did not cause the floor to be strong and solid. The kitchen floor tiles were laid onto a flexible

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

³ Unless otherwise noted, all citations to the Business Regulation Article refer to the 2015 Replacement Volume of the Maryland Annotated Code.

subfloor and did not adhere correctly. Although there was no expert testimony offered about what industry standards, if any, were violated, the lay testimony and photographs, along with the Respondent's proposed remedy, demonstrate that the results of that portion of the Respondent's work was inadequate. Md. Code Ann., Bus. Reg. § 8-401.

Having concluded that the first prong of the legal standard has been satisfied, I turn to the proof of what amount, if any, is the compensable actual loss. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed some work under the contract, and the Claimant intends to hire other contractors to remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

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).

In applying this actual loss formula, I have to be able to determine what was paid for the contract, the contract and its change orders, or the several contracts. In this case, the written record of contract terms is lacking. The Claimant paid \$1,200.00 before any agreement was struck. (Finding of Fact 2.) The short written agreement, which included wall painting, installing door locks, laying the Pergo® on the dining room and living room floor, and removing

some wall paper, set forth a price of \$850.00 for laying the floor product. (Clmt. Ex. 1, contract.) There was no contract document, or specific price, for laying the kitchen floor tiles. No memo line on the checks, or on payment proof slips, specified what the various payments were for. I cannot determine what the payment terms were for attempting to repair the web joist, or for laying the kitchen floor tiles. Many important contract terms are simply not in the evidentiary record. Of the \$11,100.00 paid by the Claimant to the Respondent's Company, \$1,200.00 appears to have been paid before any contract was entered into, and at least \$1,555.00 was paid for work that the Claimant admits was satisfactory. (Finding of Fact 2 and Fund Ex. 3.) With those figures in mind, the actual loss formula might look like this:

\$11,100.00	-	\$1,200.00	=	\$9,900.00	Amount paid to the contractor under the original contract, contract with change orders, or the several contracts
				+\$6,002.31 ⁴	Reasonable amount that might be paid to remedy some of the unworkmanlike and inadequate work performed by the contractor
				-\$9,900.00	Price of the original contract, contract with change orders, or the several contracts

				\$6,002.31	Actual loss

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the

⁴ The Next Day Floors contract document was the most clear, comprehensive, and valid of those offered into evidence. (Finding of Fact 16.)

amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant appears to be entitled recover an actual loss in the amount of \$6,002.31.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has demonstrated that she sustained an actual and compensable loss \$6,002.31 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015). I further conclude that the Claimant has shown that she is entitled to recover that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$6,002.31; and

ORDER that the Respondent is deemed to be 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 Commission⁵; and

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

Signature on File

November 8, 2018
Date Decision Issued

William J.D. Somerville III
Administrative Law Judge

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

PROPOSED ORDER

WHEREFORE, this 28th day of December, 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.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION