

**IN THE MATTER OF THE CLAIM
OF DENNIS TWOMBLY,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF STEVEN
MORELAND,
T/A MORELAND CONTRACTING,
INC.,
RESPONDENT**

*** BEFORE JENNIFER L. GRESOCK,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-18-20849
* MHIC No.: 17 (75) 58
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PROPOSED DECISION

**STATEMENT OF THE CASE
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PROPOSED CONCLUSIONS OF LAW
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STATEMENT OF THE CASE

On February 2, 2018, Dennis Twombly (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$33,628.00 in actual losses allegedly suffered as a result of a home improvement contract with Steven Moreland, trading as Moreland Contracting, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On July 2, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on September 12, 2018, at the Office of Administrative Hearings in Kensington, Maryland. Bus. Reg. § 8-407(e). Nicholas Sokolow, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent did not appear. 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.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 exhibits on the Claimant's behalf:

- Clmt. Ex. 1 - Contract Proposal, dated October 26, 2015
- Clmt. Ex. 2 - Building Permit, dated November 4, 2015
- Clmt. Ex. 3 - Blueprints, undated

¹ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on July 19, 2018, COMAR 09.08.03.03A(2), and was returned as undeliverable in August 2018. The Fund submitted an affidavit by Investigator Kevin Niebuhr confirming that Maryland Motor Vehicle Administration records reflect the address to which notice of the hearing was sent – 748 Ticonderoga Avenue, Severna Park, Maryland 21146 – as the current address. Fund Ex. 3. 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.

- Clmt. Ex. 4 - Checks reflecting payments to the Respondent: \$18,206.00 (dated October 26, 2015); \$8,000.00 and \$8,907.00 (dated November 13, 2015); \$8,000.00 and \$8,907.00 (dated February 13, 2016)
- Clmt. Ex. 5 - Photographs, dated January 12, 2016; February 15 and 19, 2016; March 31, 2016; April 13 and 18, 2016; June 30, 2016
- Clmt. Ex. 6 - Letter to Respondent from the Claimant, dated June 11, 2016
- Clmt. Ex. 7 - Letter to Respondent from the Claimant, dated June 24, 2016
- Clmt. Ex. 8 - Complaint Form, dated July 7, 2016
- Clmt. Ex. 9 - Letter to the Claimant from the Fund, dated December 21, 2016
- Clmt. Ex. 10 - Schultz Services Progress Estimate, dated September 29, 2016
- Clmt. Ex. 11 - Schultz Services Invoice, dated August 23, 2016
- Clmt. Ex. 12 - Home Depot Invoice and Receipt, dated May 21, 2016

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Notice of Hearing, dated July 19, 2018
- Fund Ex. 2 - Licensing Information, printed September 11, 2018
- Fund Ex. 3 - Affidavit of Kevin Niebuhr, dated September 11, 2018
- Fund Ex. 4 - Hearing Order, dated June 28, 2018
- Fund Ex. 5 - Letter to the Respondent, dated February 15, 2018, with attached Claim Form, dated January 22, 2018
- Fund Ex. 6 - Maryland Judiciary Case Search results, printed September 11, 2018

The Respondent was not present to offer any documents for admission into evidence.

Testimony

The Claimant testified and presented the testimony of Terry Schultz, a licensed contractor.

The Respondent was not present to testify or offer witnesses. The Fund did not present any 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 license number 01 104780.
2. On October 26, 2015, the Claimant and the Respondent entered into a contract (Contract) to remove and dispose of an existing deck, and replace it with a fully-finished sunroom and deck with railings and steps. The Respondent estimated that the work would take approximately six weeks.
3. The original agreed-upon Contract price was \$54,830.00.
4. The Claimant paid the Respondent a total of \$52,020.00. The payments were as follows: \$18,206.00 on October 26, 2015; \$8,000.00 and \$8,907.00 on November 13, 2015 (two checks); \$8,000.00 and \$8,907.00 on February 13, 2016 (two checks).
5. The Respondent began work shortly after the Contract was signed and continued for four to five months.
6. By mid-April, the Respondent had removed the existing deck, completed the support structure, deck, deck rails, and sunroom framing and roof.
7. The Respondent last worked on the project on or about April 13, 2016. At that time, the sunroom remained unfinished, with no windows or doors, no drywall or insulation, no ceiling, and no electrical wiring (ceiling fan, electrical outlets, and switches). The sunroom exterior was also unfinished, with no siding, trim, gutters, fascia, or soffits. All of these items were required by the Contract.
8. The Respondent did not have the work inspected as it progressed. Consequently, the following items were done incorrectly: improper nailing pattern on the exterior sunroom walls; metal tie straps missing between sunroom walls and roof and between sunroom walls and

deck supports; inadequate nailing and number of roof trusses; improper hardware on handrail supports; improper bolts used on all deck supports; missing washers from galvanized lag bolts; missing bracket from cement footer; and missing joist hangers and proper galvanized joist hanger nails.

9. The Claimant repeatedly contacted the Respondent in April and May 2016, asking that the order for the windows be placed and the Respondent continue work. However, the Respondent refused to do any work without additional payment.

10. In June 2016, the Claimant repeatedly requested that the Respondent complete the work, asking for a response by June 19, 2016 and the completion of the work by July 30, 2016. The Respondent did not respond, nor did he complete any additional work.

11. On June 24, 2018, the Claimant notified the Respondent that he was terminating the Contract and that the Respondent should not return to the premises.

12. On June 30, 2016, the Claimant hired another contractor, Terry Schultz of Schultz Services, to assess the work the Respondent had completed and complete the project.

13. Mr. Schultz learned that the Respondent had not had required inspections of the work done as he completed it. He therefore arranged for such an inspection to be done so that he could evaluate the full scope of the work required to complete the project correctly.

14. Schultz Services corrected deficiencies in work done by the Respondent, charging \$4,589.00 for the remediation work. In addition, the Claimant paid Schultz Services \$22,716.00 to complete the unfinished work, making the total amount paid to Schultz Services \$27,305.00. This amount includes payments made to two subcontractors, Flores Drywall (\$3,000.00) and Tech House, Inc. for electrical work (\$4,316.00).

15. The Claimant paid an additional \$9,132.53 for windows, doors, and hardware that were included in the Contract. The contract with Schultz Services did not include the cost of materials, but it did include the labor costs associated with installation of the windows and doors.

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). “[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);² 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.” 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. Based on the evidence before me, I find that the Respondent performed unworkmanlike, inadequate, and incomplete home improvements.

Mr. Schultz testified on behalf of the Claimant, stating that when he was first hired to complete the project, he assumed that the work completed by the Respondent was done correctly,

² Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

and that he would only need to complete the unfinished work. However, he learned that the Respondent's work had not been inspected by a Montgomery County inspector for compliance with county code specifications, as required, and therefore arranged for such an inspection. The inspector identified a number of items that needed to be corrected in order for the project to comply with county code. These items included improper nailing, improper bolts, missing washers, missing ties to properly secure the sunroom with regard to wind, missing deck post supports, missing roof trusses, and missing joist hangers. The cost of the remediation was \$4,589.00.

After correcting the deficiencies, Mr. Schultz completed the project, at a cost of \$22,716.00, including payments to subcontractors for drywall and electrical work. He testified that he was familiar with the scope of the Claimant's Contract with the Respondent, and that the scope of the work he (Mr. Schultz) completed for the Claimant was similar in scope. He also noted that his agreement with the Claimant did not include the cost of the windows and doors, as the Respondent's did, and that the Claimant therefore paid an additional out-of-pocket cost of \$9,132.53 for the windows and doors.

The Claimant similarly testified that the work completed by Schultz Services was the same as the work he had contracted with the Respondent to complete, though he paid separately for the windows and doors, as Mr. Schultz indicated in his testimony. The actual cost of the windows and doors substantially exceeded the amount specified in the Contract. The Claimant confirmed that he paid a total of \$27,305.00 to Schultz Services and its subcontractors, as well as an additional \$9,132.53 for the windows and doors. The Claimant testified in detail regarding the terms of the Contract, the payments that he made to the Respondent, which totaled \$52,020.00, and his repeated efforts, from mid-April through mid-June 2016, to have the Respondent complete the work. He explained that the Respondent claimed to have ordered

windows for the sunroom and said he was waiting for them to be delivered, but the Respondent eventually admitted this was not true and that the windows had never been ordered. The Claimant's good-faith attempts to negotiate a solution were met with repeated demands by the Respondent for additional funds, even though the Claimant had already paid \$52,020.00 – nearly the entire amount provided for in the Contract, and far more than the value of the work already completed.

The evidence offered by the Claimant was unrefuted. It is clear that the Respondent failed to complete the work agreed upon in the Contract. In particular, both the exterior and interior of the sunroom were left unfinished. Accordingly, I find that the Respondent was responsible for an incomplete home improvement. In addition, Mr. Schultz provided compelling and detailed testimony regarding deficiencies in the work the Respondent did complete. I found Mr. Schultz a knowledgeable witness who demonstrated familiarity with the work done by the Respondent, as well as the specific corrections that needed to be made for the project to meet county code requirements. His testimony was both comprehensive and highly specific, and I find it to be a reliable basis for concluding that the work completed by the Respondent was both inadequate and unworkmanlike.

I thus find, based on the evidence before me, that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. 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 hired another contractor to both complete and 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).

The Claimant paid \$27,305.00 to Schultz Services and its subcontractors for their work, plus \$9,132.53 for windows, doors, and hardware. The Contract with the Respondent specified \$3,500.00 for windows and \$1,200.00 for doors, including both materials and installation. The Claimant explained that this \$3,500.00 figure turned out to underestimate the cost of the windows. In addition, the Contract specified \$2,700.00 for installation of the ceiling fan, including materials. Instead, the Claimant ultimately paid \$4,316.00 for electrical work. To account for these differences, the Fund recommended using a figure of \$33,438.00 as the cost of correcting and completing the work after the Respondent abandoned the job.³ The Claimant agreed that this estimation was appropriate. I agree. The formula is therefore applied as follows:

Amount paid to the Respondent:		\$52,020.00
Amount paid to correct/complete:	+	\$33,438.00
	=	\$85,458.00

³ This is an estimate. The inexactness of this figure does not affect the Claimant's award because, as explained below, any award for an actual loss exceeding \$20,000.00 is capped at \$20,000.00.

Less original Contract price	-	\$54,830.00
Actual loss	=	\$30,628.00

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. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss of \$30,628.00 exceeds \$20,000.00. Therefore, the Claimant's recovery is limited to \$20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$30,628.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$20,000.00 from the Fund. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; 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;⁴ and

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

Signature on File

December 3, 2018
Date Decision Issued

JLG
Jennifer L. Gresock
Administrative Law Judge

JLG/dlm
#176498

PROPOSED ORDER

WHEREFORE, this 9th day of January, 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