

IN THE MATTER OF THE CLAIM
OF DAWN BECKLES,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF ROBERT TANNER,
T/A SUPEROR KITCHENS AND
BATHS, INC.

* BEFORE JEROME WOODS, II,
* ADMINISTRATIVE LAW JUDGE,
* THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-18-09822
* MHIC No.: 17 (75) 908
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RESPONDENT

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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 July 27, 2017, Dawn Beckles (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$10,286.00 in losses allegedly suffered as a result of a home improvement contract with Robert Tanner, trading as Superior Kitchens and Baths, Inc. (Respondent).

I held a hearing on June 12, 2018 at the Office of Administrative Hearings (OAH) in Kensington, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015).¹ The Claimant represented herself. Andrew J. Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Bruce Godfrey, Esquire, represented the Respondent, who was present.

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. 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 into evidence on the Claimant's behalf:²

- Cl. Ex. 1. Contract, March 9, 2016 (A)
- Cl. Ex. 2. Cancelled check receipts from Claimant to the Respondent, March 9, 2016, May 19, 2016, May 26, 2016, and June 16, 2016 (B)
- Cl. Ex. 3. Invoice Donald S. Waters, number 004321; Verified Order, March 27, 2017; Invoice Donald S. Waters, number 004322; Costco Invoice, August 20, 2016; Order Acknowledgment, August 30, 2016; Invoice, Loewen Window Center, January 23, 2017; Loewen Proposal, November 8, 2016; Loewen Window

¹ Unless otherwise noted, all subsequent references to the Business Regulation article are to the 2015 Replacement Volume.

² The Claimant's exhibits were submitted with pre-marked letters. I admitted them using the number format and have included the letter in parentheses for convenience.

- Center, January 23, 2017 with receipts, Invoice Merchant Big Blue Window, January 31, 2017, Invoice Joseph Marini, June 5, 2017 (C)
- Cl. Ex. 4. Text Communication Log, March 2016 through January 2017; Email from the Claimant to the Respondent, August 31, 2016; Email from the Respondent to the Claimant, September 8, 2016 (D)
- Cl. Ex. 5. Color photographs, October 2016 garage exterior and interior, retaining wall, windows (E)
- Cl. Ex. 6. Garage Plan blueprints, February 13, 2016 (F)

I admitted the following exhibits into evidence on behalf of the Fund:

- Fund Ex. 1. Hearing Order, March 23, 2018
- Fund Ex. 2. Notice of Hearing, April 3, 2018
- Fund Ex. 3. Letter from the Fund to the Respondent, August 3, 2017
- Fund Ex. 4. The Respondent's licensing history, June 8, 2018

The Respondent did not offer any documents into evidence.

Testimony

The Claimant and the Respondent testified for themselves.

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 80461.
2. On March 9, 2016, the Claimant and the Respondent entered into a contract to construct a two car garage and retaining wall with asphalt driveway, at the Claimant's residence.
3. The initial contract price was \$43,500.00.
4. At the signing of the contract, the Claimant paid the Respondent \$10,000.00.
5. The work was to be completed by May 1, 2016.

6. The scope of the work the Respondent was to perform is as follows:
- obtain all necessary permits;
 - tear off existing brick at the den/laundry room exterior side to prepare for garage;
 - remove existing window;
 - prepare brick on side to interlock with new addition;
 - dig footers for garage and retaining wall;
 - supply and pour concrete for footers;
 - supply and install cinder block on footers;
 - supply and install brick and mortar to match house for garage and retaining wall;
 - supply all lumber for garage and roof;
 - frame garage per drawing supplied;
 - supply shingles to install and match roof as best as possible;
 - supply and install ice/water shield and edge for roof;
 - supply and install gutters to match existing gutters;
 - supply and install soffit and fascia (white);
 - supply and install two garage doors per drawing;
 - insulate ceiling and wall between garage and house;
 - supply and install one 2868 fire rated door per drawing;
 - supply two dumpsters for the drawing;
 - supply one spot a pot for the job;
 - supply and install two fluorescent lights in the garage;
 - supply and install receptacles per code;
 - install exterior lights outside at garage door (lights supplied by Claimant);

supply and install drywall for walls and ceiling;

mud, tape and finish;

sand and prime;

asphalt driveway in front of garage addition.

7. All work performed by the Respondent was to be inspected and completed per code.

8. The Respondent began the work on the project in April 2016.

9. In May 2016, the Claimant and the Respondent orally agreed to modify the contract by an additional \$3,000.00 for the Respondent to purchase and install an additional window next to the garage.

10. The total price of the contract after the modification was \$46,500.00.

11. In addition to the \$10,000.00 paid at the time of signing the contract, the Claimant paid the Respondent the following: \$10,000.00 on May 19, 2016; \$3,000.00 on May 26, 2016 and \$7,500.00 on June 16, 2016.

12. The Claimant paid the Respondent a total of \$30,500.00.

13. As of August 31, 2016, the Respondent had not completed the following work on the project: brick installation, electrical installation, drywall installation, garage door adjustment, driveway asphalt installation and windows installation.

14. The Respondent claimed that he was having financial difficulties which caused delays in completing the project.

15. Because the Respondent did not complete the project by the deadline established in the contract, nor could he commit to a definite date when he would complete the project, the Claimant had to contact other licensed contractors in order to have the project completed.

16. The Respondent promised the Claimant in varying texts/emails to have the project completed in July and then in October 2016, but did not deliver as promised.

17. As of September 2016, the Respondent did not return to the project site.

18. As of January 2017, the Respondent stopped communicating with the Claimant.

19. In addition to the money paid to the Respondent, the Claimant paid \$26,285.77 in order to have the project completed by others. The money to complete the project was designated as follows:

\$1,450.00 for labor for soffits for garage roof, trim for two garage windows to Donald Waters, licensed contractor;

\$3,000.00 for roof materials and installation;

\$221.00 cost for soffits and "j" channel for roof above garage to Rollin Supply;

\$1,910.00 to Mr. Waters for electrical work for garage, to finish stone and brick work, frame, trim drywall and paint interior;

\$600.00 to Mr. Waters for wash brick and stone;

\$3,465.00 garage door payment to Door Pro America;

\$4,645.77 for brick, mortar, sand, and wall ties for masonry work to Potomac Valley Brick and Supply Company;

\$2,894.79 to Loewen Window Center;

\$299.21 to Big Blue Window for decorative trim to match windows;

\$4,000.00 to Joseph Marini, licensed contractor, for asphalt driveway, drainage for retaining wall, debris haul away; and

\$3,800.00 to Mr. Marini for top soil and straw for soil elevation at retaining wall.

20. The total cost to complete the project was \$56,785.77 (\$26,285.77 + \$30,500.00).

The Claimant paid the total cost for the project in full.

DISCUSSION

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); 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); *see also* COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for actual losses they 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.” Md. Code Ann., 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 parties signed the contract in March 2016 and the Respondent performed work on the project.

The contract obliged the Respondent to construct a garage, driveway and retaining wall. A review of the photographs received into evidence, corroborate the Claimant’s testimony that the Respondent performed some work, but abandoned the project. A review of the photographs

coupled with the Claimant's testimony, indicate that as of October and November 2016, the Respondent constructed the garage but did not install soffits and gutters at the front and rear of the garage. (Cl. Ex. 5). Areas of the garage and retaining wall were also missing stonework. The retaining wall needed topsoil to bring it to code so that it would not be over the height limit of three feet. While it is true that at the hearing the Claimant did not provide the code specifications for the height of the retaining wall, I found her testimony credible that the height did not meet the code, because she communicated with the necessary local office that supplied permits for the project. The Claimant was able to provide the name of the local inspector who confirmed the wall was not height appropriate and required additional top soil to bring it to code.

After the Respondent's work, the electrical lighting for the garage was incomplete. The internal framing of the windows was incomplete. An internal wall was not painted and lastly, the internal garage door was not framed.

With regard to the installation of an additional window at the cost of \$3,000.00, I find the Claimant's testimony credible that the Claimant and the Respondent orally modified the contract to include the window. I found the Claimant credible because she paid the Respondent by check for the window and the Respondent cashed the check. Additionally, the contract originally referenced one window and the Respondent and Claimant engaged in an exchange of text message/emails on November 16, 2016, where the Respondent references approval for installation of *windows*, i.e. more than one window.

In summary, the Respondent clearly completed some work under the contract with the Claimant. However, without any good reason, the Respondent abandoned the project and the Claimant engaged other contractors to complete the work. The Respondent testified that there were rain delays and that the Claimant "kicked him out" and that is why the project was not

completed as agreed to. I did not find the Respondent's testimony credible. The Claimant provided numerous texts/emails where she pleaded with the Respondent to honor the contract. The Claimant waited approximately six additional months past the anticipated completion date for the project to be completed. The Respondent simply provided excuses for not performing his duties under the contract by asking for additional money, referencing an alleged family tragedy concerning his son, and complaining of financial hardships. The Respondent abandoned the project. A careful review of the plans/blueprints for the project, and a review of the invoices indicate that the Claimant contracted with two other contractors for the work to be completed and the work was done within the scope of the contract. There is no evidence that the subsequent contractors performed any work outside of the scope of the contract or that the materials used to complete the project were of a different quality than those which were originally contemplated by the parties to the contract.

The Fund argued that if I believe the Claimant, I should award her the amount requested. For all the reasons cited above, the Claimant has met her burden. The Respondent argued that some of the items could have been purchased for a lesser amount and as such, any award should be reduced. I disagree. The Claimant consulted with the Respondent before purchasing many of the materials required to complete the project. The evidence does not indicate that any of the charges for material or labor was exorbitant or inflated.

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 correct calculation of the award is determined by COMAR 09.08.03.03B(3)(c), set forth above. According to that regulation, the calculation is as follows:

\$30,500.00 paid to the Respondent; plus amounts paid to repair or complete the contract:
+\$26,285.77
\$56,785.77; minus the contract price:
-\$46,500.00; equals:
\$10,285.77 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 amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$10,285.77.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$10,285.77 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant 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 \$10,285.77; 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;³ and

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

Signature on File

August 30, 2018
Date Decision Issued

Jerome Woods, II
Administrative Law Judge

JW/cj
#175520

³ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 10th day of October, 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.

Bruce Quackenbush

***Bruce Quackenbush
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION