IN THE MATTER OF THE CLAIM	* **BEFORE JOY L. PHILLIPS,**
OF JULIANNE MCCULLOUGH,	* **AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	* **OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	* **OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF CRISTIAN CARDONA,	*
T/A CARDONA REMODELING, LLC,	* **OAH No.: LABOR-HIC-02-19-34281**
RESPONDENT	* **MHIC No.: 18 (90) 1047**

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PROPOSED DECISION

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STATEMENT OF THE CASE

On June 3, 2019, Julianne McCullough (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),[1] for reimbursement of $7,870.00 in actual losses allegedly suffered as a result of a home improvement contract with Cristian Cardona, trading as Cardona Remodeling, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401

[1] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

through 8-411 (2015).[2] On October 21, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

The hearing dates of March 30, 2020 and September 14, 2020 were postponed due to restrictions imposed by COVID-19. I held a hearing on November 30, 2020 via a videoconferencing platform. Bus. Reg. § 8-407(e). Justin Dunbar, Assistant Attorney General, Department, represented the Fund. The Claimant and the Respondent represented themselves.

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. 2020); Code of Maryland Regulations (COMAR) 09.01.03; and 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 have attached a complete Exhibit List as an Appendix.

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and did not present other witnesses

The Fund presented no witnesses.

[2] Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

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 104954.

2. On October 27, 2016, the Claimant and the Respondent entered into a contract (Contract) to remove the existing carpet, pad, and parquet tiles from the floor of the condominium unit the Claimant was purchasing and replace that with floating bamboo flooring. The Contract also provided for the Respondent to prime and paint all textured ceilings in the unit.

3. The Claimant's unit is in an old building that has concrete floors which have settled and are uneven. The occupants of the building do not have the capability to adjust the temperature in individual units.

4. The original agreed-upon Contract price was $4,560.00. The line item cost to prime and paint all of the textured ceilings throughout the unit was $865.00, which was included in the Contract price. The Claimant and Respondent agreed to an amendment providing for the removal of some shelves and the addition of baseboard and shoe molding, at a price of $540.00, bringing the Contract price to $5,100.00. Most of the materials for the job were purchased by the Claimant and were not included in the cost of the Contract.

5. The Claimant paid the Respondent in full ($5,100.00).

6. The Respondent was familiar with the Claimant's building, having done work in it previously. He advised against using the kind of inexpensive bamboo flooring the Claimant requested, recommending a medium cost, but more expensive hardwood that would be glued down to the concrete underflooring. The Claimant insisted on the bamboo flooring because she

felt it was all she could afford. Upon her insistence, the Respondent agreed to install the floating bamboo flooring.

7. The ceiling painting was to be done before the Claimant moved into the unit, as the textured ceilings required spray painting.

8. The Respondent installed the floating bamboo flooring. This type of flooring must be installed with gaps along the edges to allow it to expand as it absorbs humidity. The gaps are hidden under the baseboard and shoe molding. The flooring does not absorb humidity or water spills without expanding, which can cause the flooring to buckle (also called tenting or peaking).

9. The gaps initially cut in by the Respondent were insufficient to prevent the flooring from buckling in some places when the unit was humid.

10. The Respondent screwed the flooring down in one place in the closet and did not install a transition where the bedroom and closet joined. Flooring that is screwed down cannot float and expand.

11. The Respondent's work was completed between November and December 2016.

12. An inspector from the flooring manufacturer toured the Claimant's unit on September 5, 2017 and found some peaks in the flooring and noted the humidity in her unit was high.

13. At the end of 2017, at the Claimant's request, the Respondent returned to the unit and cut in wider gaps under the baseboards and shoe molding. This prevented most, but not all, of the buckling. Furthermore, the flooring was spongey in some areas.

14. Another inspector inspected the flooring on October 4, 2018 and found some tenting of the flooring due to a lack of expansion space and a lack of transitions between rooms.

He also noted the flooring had been anchored to the concrete subflooring in one place. No manufacturing defects in the bamboo flooring were noted.

15. The Respondent did not paint the kitchen ceiling, but only touched up some portions of it. He did not use the same paint as he used elsewhere, resulting in the touched up portion having a different appearance from the other textured ceilings in the unit.

16. The Claimant secured an estimate from painter Jose Cortez to paint the kitchen ceiling for $650.00.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor . . . ." Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for 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 for some, but not all, of her Claim.

Flooring

The Respondent testified he is familiar with the building the Claimant lives in and knows the cement underflooring of the unit is uneven due to the building settling over time. He

recommended a medium-priced, hardwood flooring that would be glued down, preventing it from buckling. The Claimant told him she could not afford that kind of flooring and insisted he install the cheaper bamboo floating flooring she liked and purchased. Against his better judgment, he agreed.

As a result, within the next year, after humidity caused the flooring to expand and buckle in places and after sunshine faded portions of the flooring, the Claimant was unhappy with the floors. The Respondent testified that the residents of the building cannot control the heat or air conditioning in individual units. There were times when he entered the Claimant's unit that he found the balcony door or windows open, letting in humidity. He explained to the Claimant that this could warp the flooring. He also told her the sunshine would fade the floors.

The inspector from the manufacturer, who toured the Claimant's unit in September 2017, found the humidity in the Claimant's unit to be high and recommended the gaps on the edges be enlarged to allow for expansion. (Clmt. Ex. 7).

In an effort to appease the Claimant, the Respondent took his crew back to the unit in December 2017, removed the baseboards and shoe molding and cut the ends of some of the planks so allow more room for expansion. He also bolted the floor down in one section of the closet to secure some shelves.[3]

After the Claimant filed her Claim, she arranged for another inspector to examine the installed flooring on October 4, 2018. That inspector found there were no defects in the materials, found some tenting or buckling of the floor, found no transitions to have been installed, and found that the planks did not follow the recommended layout. (Clmt. Ex. 25).

[3] The testimony regarding whether he installed one or more transitions between rooms was not clear.

The Respondent testified that inspectors from manufacturers never find fault with the product and always place the blame on the installer. The Respondent said that on some of his visits, the flooring was flat, indicating the gaps he installed were sufficient to allow for necessary expansion. However, the evidence also shows there were times when the flooring buckled, whether due to humidity or installation. Further, the videos introduced by the Claimant corroborate her testimony and the inspection reports that in certain places in the unit, the flooring was spongey. (Clmt. Exs. 48-49). The Respondent conceded that in one place, he screwed the flooring into the sub-flooring to accommodate shelves.

Regarding whether the planks were installed in the correct pattern, the photographs make it appear that the planks follow the recommended stair-step pattern, yet the October 4, 2018 inspector's report indicates the planks somehow did not follow the recommended pattern. That inspector was not called to testify and explain his report. The 2017 inspector's report did not address the issue of how the planks were laid. The evidence on this limited issue is either inconsistent or insufficient for me to make a conclusion and therefore, I find that as to this allegation, the Claimant failed to carry her burden of proof.

Regarding whether the flooring was installed by the Respondent in an unworkmanlike manner, the evidence is sufficient to show that it was. Two inspectors found peaking, tenting, or buckling, as a result of the flooring not having sufficient gaps to allow for expansion when it absorbed humidity. The Respondent attempted to rectify the problem after the September 2017 inspection, but some problems persisted when a second inspector examined the unit in October 2018. It appears the Claimant often kept her windows open because she could not control the temperature in her unit; this, no doubt, led to increased humidity in the unit and to the flooring expanding. Although the Respondent was proven correct that the flooring was not appropriate

for the Claimant's old building, once he agreed to install it, he was required to install it in a workmanlike fashion.

The Claimant has obtained an estimate to have the flooring removed and replaced with the kind of glued-down, more expensive hardwood that was originally recommended by the Respondent. The cost of this project was estimated to be $6,250.00, exclusive of the materials. (Clmt. Ex. 43).

Kitchen Ceiling

The Claimant contended that the Respondent was contracted to prime and paint all of the textured ceilings in the unit before she moved in. The ceiling in the kitchen was textured and thus, should have been painted, but it was not. The Respondent said the kitchen and bathroom ceilings were not included in the work covered by the Contract, although he did not dispute that the kitchen has a textured ceiling. The Contract is clear that all textured ceilings will be primed and painted. (Clmt. Ex. 4). The Claimant referred to arguments she and the Respondent had about whether it should have been painted. She testified that one of the Respondent's crew members used the wrong can of paint to touch up part of the kitchen ceiling and it had a different finish from the rest of the ceilings in the unit. She introduced photographs showing small, black bubbles on the textured ceiling. (Clmt. Exs. 46-47). The Respondent said that those photographs showed normal bubbles that exist in textured ceilings.

One photograph shows that the original paint had a glossy sheen to it, while half of the ceiling had a dull finish. (Clmt. Ex. 41). Thus, the photograph corroborates the Claimant's testimony that the worker applied the wrong paint to part of the ceiling. The Respondent's cost to paint all textured ceilings in the unit was $865.00. (Clmt. Ex. 4). Of the four rooms in the unit that have textured ceilings, the kitchen is the smallest (13'6" x 10'). (Clmt. Ex. 36). The

Claimant said she cannot paint it herself because it must be spray-painted. She obtained an estimate for $650.00 to have it painted by Jose Cortes. (Clmt. Ex. 44). This is almost 75% of the original cost for the entire unit. Given that the kitchen is the smallest room, that estimate is unreasonably high compared to the price for painting contained in the Contract, although a somewhat higher cost would be expected because the job is more difficult now that the Claimant is living in her unit.[4]

Calculating Actual Loss

For the following reasons, I find that the Claimant is partially eligible for compensation from the Fund.

The Claimant is seeking an award that covers various costs of the original Contract, including some labor and some materials she purchased, as well as the estimated cost to paint the kitchen ceiling. Her total reimbursement requested was $7,870.00. (Clmt. Ex. 42). This request was not derived by using the award formulas provided by regulation and set forth below. Based upon her Addendum to the Claim, she is not claiming the estimated costs of replacing the flooring as an award. (*Id.*) When it was pointed out to the Claimant at the hearing that she wanted to replace the existing floor with a better quality floor, that is, glued-down hardwood, which is what the Respondent originally recommended, and that the Fund does not approve awards for replacement work which exceeds the work called for under the original Contract, the Claimant said she misunderstood how the claims procedure worked. I will discuss why the

[4] The Claimant raised numerous complaints against the Respondent for how angrily he spoke to her, how he was late to scheduled meetings, how he did not want to come to her home as often as she asked him to, and how his workers left dirt or debris behind. The Respondent replied that her demands were unreasonable, she was overly emotional in voicing her complaints, and his workers did exactly what they should have done. I have not addressed the complaints in this Proposed Decision as they are not relevant to the issue of the quality of the Respondent's work.

applicable award formulas do not result in an award to the Claimant for the flooring installed by the Respondent.

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.

> (3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:
>
> (a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.
>
> (b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.
>
> (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.

COMAR 09.08.03.03B(3)(a)-(c).

Applying the formulas to the claim for flooring

The Respondent did not abandon the Contract and therefore, section (a) does not apply to this case. The Claimant is soliciting another contractor and therefore, section (b) does not apply. The Claimant intends to retain another contractor not to complete or remedy the Contract, in which case an award might be permitted under section (c), but to install completely different, more expensive flooring, requiring a completely different kind of installation. Furthermore, the

Claimant did not introduce any evidence from which I could determine the reasonable cost to repair, not replace, the work done by the Respondent. Therefore, the Claimant failed to meet her burden to show she is eligible for an award under section (c). Nor may I apply a unique measurement to the claim for flooring, as the Claimant seeks to replace the flooring with something wholly different from that covered by the Contract, which, as I have noted, is not allowed, and she failed to produce evidence sufficient to permit me to derive an award using a unique measurement.

Applying the formulas to the claim for painting

The Claimant proved that the Contract called for the Respondent to paint the kitchen ceiling. It is in writing. (Clmt. Ex. 4). The Respondent testified there were conversations about not painting it, but as I have explained above, the Claimant met her burden of proof on this issue. She has obtained an estimate to paint it for $650.00, which is 75% of the cost of painting the entire unit's ceilings. The Fund noted in its closing argument that the cost of $650.00 seemed high by comparison to the Contract cost. I agree. Thus, under section (c), I am permitted to use a unique measurement in determining the Claimant's actual loss.

Taking into account the small square footage of the kitchen ceiling (13'6" x 10'), and balancing that against how much more difficult it is to spray paint a ceiling once the home is occupied than one that is vacant, I conclude a reasonable measurement of the actual loss is 75% of the cost of the estimate, or $487.50 ($650.00 x .75 = $487.50).

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 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 $487.50.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $487.50 as a result of the Respondent's acts or omissions and that she is entitled to recover that amount from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $487.50; 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;[5] and

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

January 25, 2021
Date Decision Issued

Joy L. Phillips
Administrative Law Judge

JLP/kdp
#190149

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

PROPOSED ORDER

WHEREFORE, this 7th day of April, 2021, 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
Chairman
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION