

IN THE MATTER OF THE CLAIM * **BEFORE RICHARD O'CONNOR,**
OF EILEEN TATE, * **ADMINISTRATIVE LAW JUDGE,**
CLAIMANT * **THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME * **OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND *
FOR THE ALLEGED ACTS OR *
OMISSIONS OF FRANK MONROE, *
T/A AMS HOME REMODELING LLC, * **OAH No.: LABOR-HIC-02-18-33622**
RESPONDENT * **MHIC No.: 18 (75) 431**

* * * * *

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 November 29, 2017, Eileen Tate (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$5,575.00¹ in actual losses allegedly suffered as a result of a home improvement contract with Frank Monroe, trading as AMS Home Remodeling LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).² On October 25, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

¹ The Claimant amended the amount of the claim to \$15,480.85 at the hearing, without objection from the Fund.
² Unless otherwise noted, all references to the Business Regulation Article cite the 2015 Replacement Volume of the Maryland Annotated Code.

I held a hearing on May 13, 2019, at the Department of Natural Resources building in Annapolis, Maryland.³ Bus. Reg. § 8-407(e). Nicholas Sokolow, Assistant Attorney General, Department of Labor (Department),⁴ represented the Fund. The Claimant appeared without representation. After waiting more than thirty 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.⁵

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 into evidence on the Claimant's behalf:⁶

Cl. Ex. 1. Contract, December 31, 2014; Certificate of Insurance, December 30, 2014.

³ A hearing scheduled for March 13, 2019, was postponed because the Claimant was ill.

⁴ On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

⁵ The OAH mailed notice of the hearing to the Respondent at his address of record by regular and certified mail on March 15, 2019. COMAR 09.08.03.03A(2). The notices were not returned as unclaimed or undeliverable. A receipt for certified mail signed by the Respondent shows that he received the notice on March 21, 2019. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Bus. Reg. § 8-312(h); COMAR 28.02.01.23A. I determined that the Respondent had received proper notice and proceeded to hear the matter.

⁶ The Claimant presented a binder of documents with fifteen tabbed sections. The exhibits listed here were the only documents admitted into evidence; the others were not offered as exhibits but remain with the file as part of the administrative record.

- Cl. Ex. 2.** Emails between the Claimant and Respondent, May 18 and September 29, 2015; invoice from Heidler, Inc., June 29, 2017; photographs of bathtub and drain stopper.
- Cl. Ex. 3.** Proposal from Heidler, Inc., December 7, 2017.
- Cl. Ex. 4.** Proposal from Brothers Services Company, undated.
- Cl. Ex. 5.** Three annotated photographs of the Respondent's work.
- Cl. Ex. 6.** Estimate from TAGcrete, LLC, December 1, 2017.
- Cl. Ex. 7.** Copies of four checks from the Claimant to the Respondent, December 30, 2014 to June 10, 2015; copy of a check from the Claimant to Capital One, February 7, 2015.
- Cl. Ex. 8.** Invoice from the Respondent to the Claimant, June 5, 2015.
- Cl. Ex. 9.** Summary of claim, undated.

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

- Fund Ex. 1.** Notice of Hearing, March 15, 2019.
- Fund Ex. 2.** Hearing Order, October 19, 2018.
- Fund Ex. 3.** Letter from the MHIC to the Respondent, December 11, 2017; Home Improvement Claim Form, November 29, 2017.
- Fund Ex. 4.** The Respondent's licensing history with the MHIC, May 10, 2019.
- Fund Ex. 5.** Receipt for certified mail signed by the Respondent, March 21, 2019.

Testimony

The Claimant testified and presented the testimony of Michael Koch. No other witnesses testified.

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 numbers 01-100527 (personal) and 05-136874 (corporate).
2. On December 31, 2014, the Claimant and the Respondent entered into a contract to renovate the Claimant's home, including the following:
 - Completely renovate the kitchen, including countertops, cabinets, sink, faucet, ceiling, breakfast bar, electrical, and plumbing (appliances to be furnished by the Claimant);
 - Enclose the existing breezeway and incorporate the space into the new kitchen;
 - Completely renovate the master bathroom, including new toilet, tub, shower, vanity (with sinks), faucets, drain stoppers, tile, flooring, plumbing, electrical, and accessories;
 - Furnish and install engineered hardwood flooring in the living room, foyer, and hallways;
 - Furnish and install carpet and pad in the master bedroom;
 - Replace existing exterior brick and concrete work with a stamped and colored concrete walkway;
 - Install pull-down attic stairs;
 - Electrical and tile work in the hall bathroom;
 - Replace an air conditioner drain line;
 - Install crown molding in the living room, dining room, and master bedroom; and
 - Prepare, patch as necessary, and paint trim and drywall in the kitchen, family room, breezeway, dining room, master bedroom, living room, and hallways.
3. The original contract price was \$92,727.00.
4. Subsequent additions to the contract increased the contract price to \$94,593.00.
5. The Claimant paid the Respondent \$93,268.00 under the contract.
6. The Respondent began work on or about January 20, 2015 and finished on or about July 7, 2015.

7. Shortly after starting work, the Respondent told the Claimant that he had underestimated the cost of stamping the concrete.
8. The Claimant agreed to have the concrete walkway extended instead of stamped.
9. The extension of the walkway was already in the contract. The Respondent did not reduce the contract price to reflect deletion of the stamping.
10. Construction principles and the building code prevented the Respondent from attaching the new kitchen breakfast bar to the existing counter, as planned. The breakfast bar had to be converted to an island, which required additional electrical work and resulted in the new lighting not being centered over the island.
11. The Respondent installed the rotary drain stopper in the new bathtub backwards, so it did not work properly.
12. The Claimant paid Heidler, Inc., \$194.80 on June 29, 2017 to install the item correctly.
13. The Respondent installed the new toilet without a flange. It began to wobble about a month after installation.
14. The Claimant received a proposal from Heidler, Inc., to remove and replace the toilet and install the flange for \$1,025.00.
15. The miter joints in several sections of crown molding were mismatched and need to be repaired.
16. Drywall and paint in several areas were poorly finished and need to be redone.
17. Brothers Services Company (Brothers Services) has proposed to perform the crown molding, drywall, and paint work for \$4,761.00.

18. TAGcrete, LLC (Tagcrete) has proposed to replace the walkway the Respondent installed with a stamped colored concrete walkway for \$9,547.85.

DISCUSSION

The Claimant has the burden of proving the validity of her 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). "[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." Bus. Reg. § 8-405(a); *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. Additionally, the Respondent performed unworkmanlike, inadequate, and incomplete home improvements.

The Claimant testified that the Respondent was personally an infrequent visitor to the job site, and that his workers seemed to lack skill and knowledge. She stated that they would often ask her what the Respondent wanted them to do that day, which she did not know.

The scope of the contract work agreed to between the parties shows two significant errors by the Respondent. First, he did not realize that the building code did not allow attaching the new breakfast bar to the existing counter. This required converting the breakfast bar into a kitchen island, which, in turn, needed an electrical outlet to comply with the building code. The Respondent had to dig up the concrete floor (the house is on a slab) to put in a conduit to the island. This work was done successfully and resulted in no additional cost to the Claimant,⁷ but a contractor who undertakes an extensive renovation like this one should be sufficiently familiar with the building code to realize that a major design element would not be allowed.

Second, not long after the contract was signed the Respondent told the Claimant that he had underestimated the cost of stamped and colored concrete for the outdoor walkway, telling her that it would cost him \$2,000.00 "out of pocket" to perform the contract as written. He asked the Claimant to forego this contract element in return for having the walkway extended to the kitchen door. The Claimant agreed to have the Respondent pour flat uncolored concrete, but realized when she was preparing her complaint that the contract already included a walkway to the breezeway. The Respondent did not reduce the contract price in return for deleting the stamped colored concrete, so the Claimant agreed to amend the contract without receiving any benefit in return. In effect, the Claimant paid for the Respondent's error in estimating the cost of the concrete. This was simply incompetence on the Respondent's part, as the cost of stamped colored concrete could have easily been ascertained before he prepared the contract.

Although the Claimant had generalized complaints about almost every aspect of the Respondent's work, her claim addresses just four specific issues: the aforementioned concrete,

⁷ The Claimant did complain that the island was not directly underneath the new recessed lighting that was meant to be over the breakfast bar.

the toilet, the drain stopper, and the drywall and painting. Except for the concrete, these issues are easily resolved.

The contract obliged the Respondent to furnish and install a new toilet in the master bathroom. He did this, but about a month later the toilet began to wobble. The Claimant complained, and the Respondent came back to make repairs. According to the Claimant, the Respondent put some kind of funnel-shaped device under the toilet, but did not install a new flange as called for in the contract. After the repairs, and to this day, the toilet still wobbles.

The estimate from Heidler, Inc., proposes to seat the toilet on a new flange for \$1,025.00. The reason for the high cost, and the probable reason why the Respondent did not install the toilet correctly, is that the concrete around the toilet has to be jackhammered, then reconstructed, so the flange can be placed properly. The Respondent did not make any modifications to the concrete floor, resulting in a wobbly toilet. The Claimant is entitled under the contract to a properly-installed toilet, so I find that this part of her claim is valid.

The same is true of the improperly installed bathtub drain. The Respondent's workers put in the drain control knob then tiled over the area. They placed the controller in backwards, so the drain would open but not close. The Claimant informed the Respondent of this defect in 2015 and asked him to repair it, but the Respondent stalled until 2017. The Claimant finally paid Heidler, Inc., \$194.80 to put the controller in correctly. This portion of the claim is also valid.

The Claimant presented testimony and photographs establishing that much of the Respondent's trim, drywall, and painting work was inadequate. Almost all the crown molding joints in three rooms are poorly mitered and unevenly joined; all must be repaired or replaced. One wall was left unpainted. In other places, the new paint bubbled or eroded shortly after it was

put on. A crack in the kitchen ceiling appeared; the Respondent tried to patch it but could not. Several areas of drywall were left unfinished.

The Claimant tried for about two years to have the Respondent return to address these problems. The Respondent did come back several times, but never adequately took care of the areas of inadequate work. The Claimant received an estimate from Brothers Services to perform the crown molding, drywall, and paint work for \$4,761.00. I find that she is entitled to recover this portion of her claim.

The concrete work is more problematic. TAGcrete has proposed to demolish the Respondent's concrete work and replace it with a stamped colored concrete walkway for \$9,547.85. The contract with the Respondent included the following exterior work:

- Take out existing brick and concrete work on the front of the house down to the driveway
- Form new pad in front of house from Breezeway to entire front of house with walkway continuous to driveway including walkway from driveway to other side of Breezeway.
- Pour concrete and stamp concrete and color concrete per customer's color choice.

Clt. Ex. 1.

This section of the contract also included patching two cracks in the garage front wall and repairing a small defect on the rim of the bathtub in the hall bathroom. The cost of labor and materials for all this work was \$6,250.00, almost all of which can be allocated to the concrete work. The Respondent later told the Claimant that the stamping and coloring would cost him \$2,000.00 out-of-pocket, which I take to mean that he felt he should have added \$2,000.00 to the contract price. This would place the cost of the Respondent's concrete work at about \$8,000.00, not unreasonably different from TAGcrete's proposal.

The problem with this part of the Claimant's claim is that she agreed to the Respondent's request to delete the stamped colored concrete from the contract. The Claimant argued that she received no consideration, either in the form of a longer walkway or a reduction in price, for her agreement, and therefore the amendment to the contract was not valid. She maintained that she is entitled to the stamped colored concrete as in the original contract provision.

Administrative agencies such as the MHIC derive their authority from the statutes that establish them. *Brzowski v. Md. Home Imp. Com'n*, 114 Md.App. 615, 626 (1997). Claims against the Fund are controlled by sections 8-401 through 8-411 of the Business Regulation Article, not by principles of contract law.

As stated previously, a claimant may recover compensation from the Fund only for an "actual loss that results from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a). COMAR 09.08.03.03B(2) is slightly more specific, allowing "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.

This statutory and regulatory scheme means that, to recover from the Fund, a homeowner must prove misconduct, or at the very least an act or omission, resulting in an unworkmanlike, inadequate, or incomplete home improvement that causes an actual monetary loss. I do not find those requirements present with regard to the concrete.

The Claimant presented no evidence that the walkway the Respondent installed was unworkmanlike, inadequate, or incomplete.⁸ In fact, the concrete walkway seems perfectly adequate; the Claimant's complaint is that it is not stamped and colored. The Claimant contends

⁸ The Claimant took issue with the Respondent's leaving the downspout in place to discharge water onto the walkway, but this was not an element of the contract or even a home improvement.

that the Respondent tricked her into agreeing to plain concrete by promising something that was already in the contract – an extension of the walkway. This argument is not persuasive. The conversation about the concrete apparently took place in January 2015, less than a month after the contract was signed. The Claimant could easily have checked the terms of the contract before agreeing to the change. I find, therefore, that the Respondent committed no misconduct, act, or omission that led to an inadequate home improvement concerning the walkway. This part of the claim will be disallowed.

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). The 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 work under the contract, and the Claimant has retained and intends to retain other contractors to complete or remedy that work. In this situation 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 calculations of the actual loss are as follows:

\$93,268.00 paid under the contract,⁹ plus
1,025.00 to repair the toilet;
194.80 to repair the bathtub drain; and
+ 4,761.00 to repair drywall, trim, and painting; equals
\$99,248.80 minus
- 94,593.00 the contract price; equals
\$4,655.80 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. 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 \$4,655.80.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$4,655.80 as a result of the Respondent's acts or omissions. 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. Bus. Reg. § 8-405.

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$4,655.80; and

⁹ This amount comes from the copies of the checks the Claimant submitted (Cit. Ex. 7) plus her testimony that she made a final payment of \$450.00.

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;¹⁰ and

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

Signature on File

August 5, 2019
Date Decision Issued

Richard O'Connor
Administrative Law Judge

ROC/kdp
181258

¹⁰ See Bus. Reg. § 8-410(a)(1)(iii); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 23rd day of October, 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.

Michael Shilling

***Michael Shilling
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION