

IN THE MATTER OF THE CLAIM OF	*	BEFORE LATONYA B. DARGAN,
BRIAN AND FRANCES MCHUGH,	*	AN ADMINISTRATIVE LAW JUDGE
CLAIMANTS	*	OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	*	OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF BRETT	*	
SCHOOLNICK,	*	
T/A THE BAYWOOD DESIGN/BUILD	*	
GROUP, INC.,	*	OAH No.: DLR-HIC-02-18-26924
RESPONDENT	*	MHIC No.: 18 (75) 436

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On or around November 20, 2017, Brian and Frances McHugh (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), in which they alleged sustaining actual monetary losses as a result of a home improvement contract with Brett Schoolnick, t/a The Baywood Design/Build Group, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On August 17, 2018, the MHIC ordered the Claimants should have a hearing to establish their eligibility for an award from the Fund. On

August 22, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On December 7, 2018, I conducted a hearing at the Maryland Department of Natural Resources in Annapolis, Maryland. Bus. Reg. § 8-407(e). The Claimants represented themselves. Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. No one appeared on behalf of the Respondent. The Respondent was sent a Notice of Hearing by the OAH via regular mail and certified mail, return receipt requested, on September 27, 2018. The Respondent signed the certified mail return receipt and the signed receipt was returned to the OAH on October 9, 2018. Therefore, I find the Respondent received proper notice of the date, time, and location of the hearing and despite receiving such notice, failed to attend. I proceeded with the hearing in the Respondent's absence. Code of Maryland Regulations (COMAR) 28.02.01.23A.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 09.01.03 and 28.02.01.

ISSUES

1. Did the Claimants sustain an actual monetary loss compensable by the Fund as a result of the Respondent's acts or omissions; and,
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

Frances McHugh testified on behalf of the Claimants. No one testified for the Respondent. The Fund did not present witnesses.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all relevant times, the Respondent was a home improvement contractor licensed by the MHIC.
2. On or around September 26, 2016, the Claimants met with the Respondent for a consultation on the renovation of their basement. The Respondent prepared an initial design, for which the Claimants paid him \$1,500.00. The design fee was reimbursable to the Claimants in the event they entered into a contract with the Respondent.
3. On or around October 6, 2016, the Claimants entered into a contract (Contract) with the Respondent for the Respondent to renovate the basement of their residence in Glen Burnie, Maryland (Property).
4. Under the Contract, the Respondent was to do the following:
 - Obtain all necessary permits
 - Complete demolition of existing basement and removal of all debris and trash
 - All framing work for the renovated basement
 - Install steel lolly columns
 - Install bulkheads
 - Install corrugated metal ceiling
 - Install insulation
 - Install shelving units
 - Replace all trim at the windows and around the baseboards
 - Re-panel the existing game room
5. The Respondent was also responsible for securing subcontractors who were responsible for the following work: electrical; floor leveling and installation of laminate flooring;

heating, ventilation and air conditioning (HVAC) system; painting; plumbing; installation of sheetrock; and installation of new stairs and accompanying railings.

6. The initial Contract price, for the renovation to the basement, was \$56,079.00, with an initial deposit of \$18,500.00 due upon the signing of the Contract. The balance was due in installments which were payable at the commencement of each stage of the renovation. There were seven stages of renovation and the final installment was due at the completion of the project punch list.

7. Under the Contract, work was to commence sometime in October 2016 and be substantially completed by February 15, 2017.

8. On or around October 7, 2016, the Claimants and the Respondent entered into an addendum to the Contract, under which the Respondent would also be responsible for the following:

- Add brick veneer to the walls
- Renovation to basement bathroom
- Construction of a bar, including installation of bar cabinets
- Construction of a game room
- Under-stair storage components
- Substitution of originally-planned pine stairs for maple stairs

9. The total cost of the addendum to the Contract was \$32,095.00.

10. The Respondent began work at the Property sometime in October 2016 and continued work in accordance with the schedule established under the Contract until approximately mid-December 2016. From approximately December 13, 2016 through January 5, 2017, the Respondent completed no work at the Property.

11. Starting on or around January 5, 2017, there were multiple delays in progress on the project. The Respondent assigned subcontractors to other job sites, missed county inspection appointments, delayed the delivery of a dumpster for collection of debris and other trash and, on at least one occasion, placed an incorrect order for cabinets.

12. In addition to delays at various stages of the project, the Respondent ordered upgraded materials related to the electrical, HVAC, and plumbing work without first discussing the potential cost increase with the Claimants. The Claimants paid the upgrade costs, but warned the Respondent that going forward he had to discuss any upgrades with the Claimants *before* placing material orders.

13. When the Claimants became concerned the project would not be completed by mid-February 2017, they had a meeting with the Respondent on or around January 31, 2017 to discuss scheduling. As a result of the meeting, the Respondent provided the Claimants with a new projected completion date of April 11, 2017.

14. Throughout February 2017, the project experienced delays, including the Respondent's failure to complete the electrical and plumbing rough-ins, which in turn led to a delay in the sheetrock installation. By March 1, 2017, the project was two weeks behind the revised schedule and the plumbing rough-in was not complete.

15. By mid-March 2017, the plumbing work was still not completed on the project. When the Claimants suggested hiring a different subcontractor to get the work completed, the Respondent declined, citing his long-standing work relationship with the existing plumbing company.

16. The electrical work was also not complete by mid- to late-March 2017. When the Claimants suggested to Mr. Haack, the project foreman, to use a different electrician, he was

non-responsive. By March 30, 2017, the electrical work on the project was approximately seven weeks behind schedule.

17. On at least two occasions, the Claimants requested the Respondent reduce the scope of work under the Contract in an effort to have the renovation of the basement substantially completed. The Claimants further advised the Respondent that their absolute deadline for completion of the project was May 12, 2017, as they were scheduled to have visitors from out of state.

18. By the end of April 2017, the electrical and plumbing work at the Property was still not completed and the subcontractors responsible for the work would not return to the project because they had not been paid by the Respondent.

19. Under the Contract, the Respondent was responsible for all county inspections and any permit issues. On or around April 26, 2017, a county inspector advised Mr. Haack that the basement stairs would not pass a code inspection because the rise and run resulted in a staircase that was too steep. Although the Respondent was responsible for either correcting the problem or obtaining a necessary waiver from the county, he did not produce a waiver to the Claimants until on or around July 19, 2017.

20. Throughout May, June and July 2017, the Claimants remained in contact with the Respondent, either directly or through Mr. Haack, in an effort to get the Respondent to commit to a practical schedule which would allow for the completion of the basement renovation as outlined under the Contract and the October 7, 2016 addendum. The Respondent continually advised the Claimants the delay in work was the fault of his subcontractors, but for reasons he could not adequately explain.¹

¹ Upon talking to the subcontractors directly, the Claimants discovered the primary issue was the Respondent's failure to pay for work previously performed. (See Fund Ex. 7.)

21. On or around August 13, 2017, the Claimants received an email from the Respondent in which he advised them his home improvement company would cease operations, effective August 14, 2017, and would file for bankruptcy protection.

22. As of August 13, 2017, the following work that was within the scope of the Contract, its addendum, and any change orders was incomplete:

- Cabinets and cabinet hardware installation
- Missing basement door
- Trim work throughout basement, including in the renovated bathroom and the game room
- Missing staircase
- Missing shelving in utility room
- Lolly column unwrapped
- Bathroom: missing light fixtures; missing outlets; missing exhaust fan; sink and toilet not installed; over-sink mirror not installed; missing tile grout; shower door not installed; shelving not installed
- Electrical work: missing lights and light fixtures; missing outlets; missing smoke detector; missing stairwell lights and switches; missing wall-installed space heater; wine refrigerator hookup; new sump pump wiring
- Game room: HVAC return not installed; missing outlets; missing switches; network connections not installed
- Plumbing work: Dishwasher hookup; missing sump pump and pit bucket in utility room; incomplete installation of ejector pit and sump pump in utility room

23. The Claimants obtained estimates from other contractors² to complete the work the Respondent failed to perform, including the carpentry, electrical, and plumbing work.

24. The total estimate to complete the outstanding work under the Contract and its addendum was \$18,821.00.

² The contractors were as follows: Wireworx Electric, Inc.; Ehrhardt Brothers Quality Plumbing Inc. (Ehrhardt Bros.); North Brookfield Plumbing; and Vertex Carpentry. All of these entities are licensed by the MHIC.

25. The total amount of money paid by the Claimants to the Respondent under the Contract and its addendum, and including all change orders, was \$97,306.34.

DISCUSSION

In this case, the Claimants have 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); *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 Claimants have proven eligibility for compensation.

There is no dispute the Respondent was a home improvement contractor licensed by the MHIC at the time he entered into the Contract with the Claimants on October 7, 2016 and at all times while he performed work at the Property. *See* Fund Ex. 4. The evidence presented overwhelmingly demonstrates the Respondent fell behind schedule in performing the contract and, by the time he advised the Claimants he was going out of business and filing for bankruptcy protection in August 2017, he had not completed significant components of work specified in the Contract, its addendum, and associated change orders. *See* Cl. Exs. P, S, II, KK. Mrs. McHugh

testified comprehensively and persuasively about the Claimants' experiences dealing with the Respondent. She explained that for approximately the first two months of work, the Claimants were satisfied with the Respondent's progress in the initial demolition and preparatory stages of the project. By January 2017, however, the Respondent started to fall behind schedule. There were multiple days throughout the Winter and early Spring 2017 where no work was being done at the Property, and the Claimants had difficulty getting into contact with Mr. Haack, who acted as the foreman for the project. It is clear from the evidence how patient the Claimants were with the Respondent, and how many opportunities they gave him to bring the work back on schedule throughout Spring and early Summer 2017. There came a point where the Claimants had to bypass the Respondent entirely and deal directly with subcontractors to get any movement on the electrical and plumbing phases of the Contract.³

The Claimants carefully documented the history of the project and the evidence demonstrates that at the point in time the Respondent essentially abandoned the job on August 14, 2017, there was substantial work in the basement, bathroom, game room, and utility room – all of which were within the scope of the Contract and the addendum – that was simply not completed. *See* Cl. Ex. KK. The evidence further demonstrates that of the work that was completed, such as the basement flooring and the bathroom tiling, it was inadequate and unworkmanlike. *Id.*

Based on the evidence, I find the Claimants have demonstrated the Respondent performed an inadequate, incomplete, and unworkmanlike home improvement and they are, therefore, eligible for an award from the Fund. Having found the Claimants eligible for an award from the Fund, I must determine the amount of the Claimants' actual loss and the amount, if any, the Claimants are 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);

³ For example, Ehrhardt Bros., with whom the Claimants ultimately contracted directly to complete the plumbing work, were among the Respondent's subcontractors when the project commenced.

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. COMAR 09.08.03.03B(3).

In this case, the Respondent performed some work under the contract, and the Claimants retained another contractor to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimants' 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).

Applying the formula set out above leads to the following results:

Amount paid to the Respondent	\$97,306.34 ⁴
+ Amount paid to correct or complete the work	<u>\$18,821.00⁵</u>
	\$116,127.34
- Amount of original contract	<u>\$56,079.00⁶</u>
Amount of actual loss	\$60,048.34

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for the 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 Claimants' actual loss of \$60,048.34 is greater than the statutory maximum and less than the actual amount paid by the Claimants to the Respondent. The Claimants are therefore entitled to an award from the Fund that is equal to the statutory maximum, \$20,000.00.

⁴ See Cl. Ex. OO

⁵ See Cl. Ex. NN

⁶ See Cl. Ex. OO

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of \$60,048.34 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 the Claimants are entitled to recover an award in the amount of \$20,000.00, the statutory maximum, 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 Claimants \$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;⁷ and

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

February 28, 2019
Date Decision Issued

/s/ Latonya B. Dargan
Administrative Law Judge

LBD/cmg
#178116

⁷ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

IN THE MATTER OF THE CLAIM OF * BEFORE LATONYA B. DARGAN,
BRIAN AND FRANCES MCHUGH, * AN ADMINISTRATIVE LAW JUDGE
CLAIMANTS * OF THE MARYLAND OFFICE
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GROUP, INC., * OAH No.: DLR-HIC-02-18-26924
RESPONDENT * MHIC No.: 18 (75) 436

* * * * *

APPENDIX: FILE EXHIBIT LIST

I admitted the following exhibits for the Claimants:⁸

- CL. Ex. A: Cancelled check, September 27, 2016
- CL. Ex. B: Design plan and emails, October 10, 2016
- CL. Ex. C: Contract, October 6, 2016
- CL. Ex. D: Initial deposit, October 11, 2016
- CL. Ex. E: Modifications to contract, October 18, 2016
- CL. Ex. F: Cancelled checks, October 18, 2016 through November 15, 2016
- CL. Ex. G: Change order, November 15, 2016
- CL. Ex. H: Cancelled checks, November 29, 2016 through December 14, 2016
- CL. Ex. I: Cancelled checks, January 19, 2017 through January 25, 2017
- CL. Ex. J: Change order and associated invoices, January 12, 2017 through February 15, 2017
- CL. Ex. K: Emails and new schedule of work, January 31, 2017
- CL. Ex. N: Updated schedule, undated
- CL. Ex. P: Text messages, February 17, 2017 through March 8, 2017
- CL. Ex. Q: Emails, February 17, 2017

⁸ The Claimants marked their exhibits sequentially for identification purposes, but they did not offer all potential exhibits. Any gaps in the sequence of exhibits represents an exhibit that was identified, but not ultimately offered into evidence.

- CL. Ex. R: Cancelled check, February 22, 2017
- CL. Ex. S: Text messages and emails, March 8, 2017 through April 2, 2017
- CL. Ex. T: Email and change order, April 4, 2017
- CL. Ex. U: Updated schedules, April 2017 and May 2017
- CL. Ex. V: Emails, April 24-26, 2017
- CL. Ex. W: Emails re: stairs/framing inspection, April 26, 2017
- CL. Ex. Y: Email re: brick veneer, May 10, 2017
- CL. Ex. Z: Email re: closet shelving, May 11, 2017
- CL. Ex. DD: Request for stair waiver, June 7, 2017
- CL. Ex. HH: Emails re: stairs, July 19, 2017 through July 24, 2017
- CL. Ex. II: Text messages and emails, July 21, 2017 through August 11, 2017
- CL. Ex. JJ: Notification of bankruptcy filing, August 13, 2017
- CL. Ex. KK: Photographs, August 14, 2017
- CL. Ex. LL: Estimates, September 2017
- CL. Ex. MM: DLLR Licensing information for prospective contractors, undated
- CL. Ex. NN: Spreadsheet of estimates and actual cost to complete work, undated
- CL. Ex. OO: Total Baywood costs/paid/overpayment spreadsheet, undated
- CL. Ex. PP: Photographs, taken throughout 2017 and 2018
- CL. Ex. QQ: Photo and estimate, HVAC issues, December 3, 2018
- CL. Ex. RR: Spreadsheet of final actual losses, undated

I admitted the following exhibits for the Fund:

- Fund Ex. 1: Notice of Hearing, issued on September 26, 2018
- Fund Ex. 2: MHIC's Hearing Order, August 17, 2018
- Fund Ex. 3: Emails, September 14 and 19, 2017
- Fund Ex. 4: The Respondent's Licensing History, printed November 5, 2018
- Fund Ex. 5: Home Improvement Claim Form, November 15, 2017
- Fund Ex. 6: Keyonna Penick's letter to the Claimants, August 17, 2018
- Fund Ex. 7: Timeline of events, undated

PROPOSED ORDER

WHEREFORE, this 25th day of April, 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