

<p>IN THE MATTER OF THE CLAIM</p> <p>OF DEBORAH KIDD,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF GARY COOPER,</p> <p>T/A COOPER RESTORATION &</p> <p>REMODELING LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE MICHAEL R. OSBORN,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: DLR-HIC-02-18-28809</p> <p>* MHIC No.: 18 (75) 44</p> <p>*</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On November 17, 2017, Deborah Kidd (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$8,401.00 in actual losses allegedly suffered as a result of a home improvement contract with Gary Cooper, trading as Cooper Restoration & Remodeling LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On September 12, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on January 2, 2019 at the Tawes State Office Building in Annapolis, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e). Eric B. London, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department, or DLLR), represented the Fund. The Claimant represented herself. The Respondent represented himself.

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

Testimony

The Claimant testified.¹

The Respondent testified.

The Fund did not present any witnesses.

¹ The Claimant was assisted by a sign language interpreter.

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 105701.

2. The Claimant resides in Westminster, Maryland. The Claimant owns 8698 Maryland Parkway, Chestertown, Maryland, (8698), and is a joint owner with her daughter of 8716 Maryland Parkway, Chestertown, Maryland (8716).

3. On September 30, 2016, the Claimant and the Respondent entered into a contract to install Pergo laminate flooring and DuraCeramic tile flooring (Contract). Although the work to be performed was at 8698, the only property identified in the Contract was 8716. The Contract contained an addendum to install two wall cabinets in the laundry room at 8716 for \$750.00. The total Contract price, with addendum, was \$14,099.00.

4. The Contract did not include any terms relating to the rooms in which the Pergo laminate and DuraCeramic floors would be installed, but the parties agreed in conversations and in text message exchanges where the work would be performed. The Contract included the following, all to be performed at 8698:

- Removal of ceramic tile flooring in the utility room and removal of vinyl flooring in two bathrooms;
- Installation of Pergo laminate flooring in five rooms, a hallway and the sunroom;
- Installation of DuraCeramic flooring in five rooms, a pantry and an entranceway;
- Raising the level of the floor in the sunroom;
- Installation of appropriate subfloors in all rooms where DuraCeramic was to be installed; and,

- Installation of shoe moldings along all baseboards where the new floors were installed.

The only work to be performed at 8716 was installation of two wall cabinets.

5. The Claimant selected the laminate flooring from samples the Respondent displayed to her. The Claimant approved a substitute laminate floor brand other than Pergo. The parties did not renegotiate the Contract after the substitute brand was selected.

6. The Claimant selected a color and style of DuraCeramic from a catalog.

7. Under the Contract the work would commence on or about October 14, 2016 and the work would be substantially complete three days after commencement.

8. On September 30, 2016 the Claimant paid the Respondent \$4,400.00.

9. On October 19, 2016, work at 8698 began, and the Claimant paid the Respondent \$8,000.00.

10. The Claimant, the Claimant's daughter, and the Claimant's son-in-law used a rotation method to ensure someone was present at 8698 to greet workers and allow access, and to be present to observe and answer questions when work was being done. The Claimant took time off work when it was her turn. Whether someone from the Claimant's family was present at 8698 was a matter of coordination with the Respondent and relied on the Respondent being present to work at 8698 on dates he indicated he or his workers would be there.

11. Work under the Contract proceeded smoothly for two days. The Respondent removed flooring where necessary, leaving exposed plywood subfloor in several rooms where new floors were to be installed.

12. After two days of work the Respondent and/or his workers arrived in sporadic fashion, or not at all. The Respondent offered various excuses for why no workers were present,

and blamed delays on poor communication, material shortages, work on other sites which required his attention, vehicles in the repair shop, and subcontractors.

13. On October 31, 2016, the Respondent told the Claimant the DuraCeramic order had arrived but was short, and he would have to contact the supplier to correct the shortage. The Respondent told the Claimant he expected the rest of the DuraCeramic would arrive by the end of the week. On November 16, 2016, the Respondent told the Claimant the rest of the DuraCeramic had arrived and installation would begin the next day. The Respondent did not do any work or arrive at the Claimant's home the next day. The Respondent never delivered any DuraCeramic to 8698 for installation.

14. On November 2 and November 8, 2016, the Respondent installed laminate flooring. The installed of the laminate flooring was unworkmanlike. Edges where the laminate floor was to join a later-to-be-installed DuraCeramic floor were uneven. At some locations, the Respondent used small pieces to patch and fill, with unattractive results. Shoe moldings were cut at improper angles, or shoe molding cut at an angle was joined to shoe molding cut flush. This left large gaps in the shoe molding at corners. In at least one instance, shoe molding was joined in the corner with larger, different-profile quarter-round trim. In some areas no shoe molding was installed.

15. Within a few months of installation, the laminate floor developed separations at the seams, both at the ends and along the lengths of adjoining pieces. The laminate floor developed buckles and surges.

16. On December 8, 2016, the Respondent closed the water supply to 8698 and removed the home's water heater and utility sink from a utility room where DuraCeramic was to be installed. The Claimant staged the water heater and utility sink in the Claimant's dining room

for later re-installation. In the bathroom the Respondent removed the toilet, staging it elsewhere for later re-installation. This left the house without water or a toilet.

17. On December 12, 2016 the Respondent told the Claimant he was still working with his flooring person to get the DuraCeramic installed.

18. Throughout December 2016 the Claimant was in contact with the Respondent, typically by text message. Most communication was related to a common themes – when would workers be present so someone from the Claimant’s family could be there, and when would the Respondent finish the Contract?

19. On December 30, 2016, the Claimant mailed the Respondent a letter demanding the Respondent establish specific dates and times work under the Contract would be performed and a specific date the Contract would be finished. On January 9, 2017, the Respondent responded by text message, apologizing for the delay but also stating that workers arrived at 8698 on December 23, 2016 but no one was home. The Claimant’s son-in-law and grandson were present at 8698 all day December 23, 2016.

20. On January 19, 2017, a worker installed shoe molding and quarter-round on some baseboards.

21. The Respondent did no work under the Contract after January 19, 2017.

22. Throughout January, February and March 2017 the Claimant persisted in her effort to convince the Respondent to finish work under the Contract. In one text message the Claimant suggested a refund of her money if the Respondent was not interested in completing the Contract.

23. On April 2, 2017, the Respondent informed the Claimant that due to a knee injury he would be unable to install the DuraCeramic and he was checking with another installer about

doing the work. The Respondent told the Claimant the other installer may want to visit 8698 to see what must be done. No other flooring installer ever contacted the Claimant or visited 8698 to see what must be done to install the DuraCeramic.

24. On June 23, 2017, the Claimant lodged a complaint with the MHIC.

25. On July 30, 2017, the Respondent texted the Claimant, and in the text said he had paid an unnamed installer to install the DuraCeramic and the wall cabinets, and had provided all of the DuraCeramic to the installer to do so. The Respondent also said he instructed the installer to collect the final installment on the Contract and to keep it for himself. Thus, he explained to the Claimant, he thought the Contract was complete and the Claimant was satisfied. The Respondent said in the text message the unnamed installer had, apparently, moved to Florida and taken the DuraCeramic and the Respondent's money with him. The Respondent did not offer to purchase more DuraCeramic and install it, nor offer to buy two wall cabinets and install them, nor did he identify a date when the DuraCeramic work would be performed or the wall cabinets would be installed.

26. The following work under the Contract was not performed at 8698:

- Existing flooring was not removed from two bathroom floors;
- Appropriate subfloor for the DuraCeramic product was not installed;
- DuraCeramic flooring was not installed; and,
- Shoe molding was not installed in rooms and areas to be floored with
- DuraCeramic.

27. No wall cabinets were installed at 8716.

28. On October 18, 2017, the Claimant obtained an estimate in the amount of \$10,709.60 from Bay Carpets, Cabinets and Floors, a MHIC licensed contractor,² to complete the incomplete work under the Contract and to correct the work done in unworkmanlike manner under the Contract. The work has not yet been performed.

29. The Claimant's actual loss is as follows:

Amount paid to the Respondent:	\$12,400.00
plus Estimate to complete and correct:	\$10,709.60
	\$23,109.60
minus Contract price:	\$14,099.00
equals Actual loss:	\$ 9,010.60

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) (2015); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).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.”

² The Claimant obtained two estimates, one of which was from a Timothy M. Cordes, a contractor with a Pennsylvania business address, not licensed by the MHIC. The Claimant submitted the Cordes estimate in support of her Claim. The Cordes estimate was \$609.00 lower than the Bay Carpets, Cabinets and Floors estimate. I permitted the Claimant to amend the Claim upward by \$609.00.

³ As noted above, “COMAR” refers to the Code of Maryland Regulations.

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 Respondent performed unworkmanlike and incomplete home improvements, as described in Findings of Fact 12 through 16, 20 through 21, and 26 through 27.

I thus find 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 intends to retain other contractors to complete or 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 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 \$9,010.60.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$9,010.60 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 \$9,010.60 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$9,010.60; 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

January 28, 2019
Date Decision Issued

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Michael R. Osborn
Administrative Law Judge

(rh)

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PROPOSED ORDER

WHEREFORE, this 25th day of March, 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