

IN THE MATTER OF THE CLAIM	* BEFORE EMILY DANEKER,
OF MERRY HUDSON,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH No.: DLR-HIC-02-18-31023
FOR THE ALLEGED ACTS OR	* MHIC No.: 18 (05) 446
OMISSIONS OF BRETT	*
SCHOOLNICK,	*
T/A THE BAYWOOD DESIGN/BUILD	*
GROUP, INC.,	*
RESPONDENT	*

* * * * *

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 17, 2017, the Maryland Home Improvement Commission (MHIC) received a claim filed by Merry Hudson (Claimant) seeking reimbursement from the Maryland Home Improvement Guaranty Fund (Fund) for \$24,000.00 in actual losses allegedly sustained as a result of the acts or omissions of Brett Schoolnick, trading as The Baywood Design/Build

Group, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ On or about October 1, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on February 14, 2019 at the OAH's office in Kensington, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e). The Claimant represented herself. Eric B. London, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. Neither the Respondent, nor anyone authorized to represent him, appeared for the hearing. I waited fifteen minutes past the scheduled hearing time and then 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 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

The Claimant offered the following exhibits, which I admitted into evidence:

- Clmt. Ex. 1 - Memorandum to the Claimant from the Respondent, dated June 30, 2017;
Contract Agreement, dated June 30, 2017
- Clmt. Ex. 2 - Canceled check, dated July 3, 2017

¹ Unless otherwise indicated, all citations to the Business Regulation article of the Annotated Code of Maryland are to the 2015 Replacement Volume.

- Clmt. Ex. 3 - Partial email chain between Claimant and Respondent, emails dated between July 24, 2017 and August 11, 2017
- Clmt. Ex. 4 - Email from Respondent to Claimant, dated September 17, 2017
- Clmt. Ex. 5 - Notice of Chapter 7 Bankruptcy Case—No Proof of Claim Deadline, case filed September 19, 2017
- Clmt. Ex. 6 - Letter from Barton J. Sidle, counsel for the Respondent, to the MHIC, dated November 6, 2017
- Clmt. Ex. 7 - Respondent's Voluntary Petition for Non-Individual Filing for Bankruptcy, filed September 19, 2017

The Fund offered the following exhibits, which I admitted into evidence:

- GF Ex. 1 - Notice of Hearing, dated October 22, 2018
- GF Ex. 2 - Notice of Hearing, dated January 16, 2019
- GF Ex. 3 - MHIC Licensing History for Respondent, dated February 11, 2019
- GF Ex. 4 - Letter from Mr. Sidle to the MHIC, dated November 6, 2017
- GF Ex. 5 - MHIC Hearing Order, dated September 25, 2018
- GF Ex. 6 - Home Improvement Claim Form, received November 17, 2017
- GF Ex. 7 - Letter from the MHIC to the Respondent, dated November 29, 2017

No documents were submitted on behalf of the Respondent.

Testimony

The Claimant testified in her own behalf. There were no other witnesses called to testify at the hearing by any party.

PROPOSED FINDINGS OF FACT

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

1. At all relevant times, the Respondent was a licensed home improvement contractor under MHIC license number 01-21664.

2. On June 30, 2017, the Claimant and the Respondent entered into a contract (Contract) for the Respondent to construct an addition to the Claimant's vacation house in Chester, Maryland.

3. The original agreed-upon Contract price was \$73,545.00, with an initial deposit of \$24,000.00 due prior to the start of any work. The Contract provided that the approximate start date for the work was July 28, 2017.

4. On July 3, 2017, the Claimant paid the Respondent the initial deposit of \$24,000.

5. The Respondent performed no work under the Contract.

6. The Respondent filed for bankruptcy on September 19, 2017.

7. The Claimant filed a claim in the Respondent's bankruptcy but has not filed any other claims related to the Contract or the Respondent's work, aside from her claim against the Fund.

8. The Contract contains an arbitration provision that states: "Any claims or disputes arising out of this contract or to the breath [sic] thereof, shall be decided in binding arbitration through Construction Arbitration Associates, Ltd." The Contract's arbitration clause further provides that any claim filed against the Fund shall be stayed until the completion of arbitration. The parties did not initial the arbitration provision, as required. (Clmt. Ex. 1, Contract at 7, ¶ 24.)

9. Sometime prior to October 17, 2017, the Claimant filed a regulatory complaint against the Respondent with the MHIC. The MHIC forwarded the complaint to the Respondent on or about October 17, 2017. On November 6, 2017, in response to the regulatory complaint, the Respondent, through counsel, admitted he had not performed the Contract work and advised that the business was in bankruptcy and no longer conducting operations. Along with that letter, counsel for the Respondent enclosed a copy of the Contract.

10. The Claimant filed her Fund claim with the MHIC on November 17, 2017 and the MHIC forwarded the claim to the Respondent on November 29, 2017.

11. At no time did the Respondent attempt to enforce the arbitration provision in the Contract.

12. The Claimant is not related to the Respondent and is not a business affiliate of the Respondent.

13. In addition to the house in Chester, Maryland, the Claimant owns two other homes in Maryland: one in Silver Spring and one in Hyattsville. The Claimant resides in the home in Silver Spring, Maryland.

DISCUSSION

I. Notice to the Respondent

The statutory provisions governing disciplinary proceedings against MHIC licensees state that notice of the proceeding shall be sent by certified mail to “the business address of the licensee on record with the Commission.” Md. Code Ann., Bus. Reg. § 8-312(d). These same notice procedures apply to proceedings involving claims against the Fund. Md. Code Ann., Bus. Reg. § 8-407(a). The purpose of the notice requirement is to provide a measure of due process.

The MHIC’s business address of record for the Respondent is P.O. Box 1011, Columbia, Maryland 21044-0020. (GF Ex. 3.) On October 22, 2018, the OAH sent the Respondent a Notice of Hearing (Notice), advising that the hearing was scheduled for 10:00 a.m. on February 14, 2019, at the OAH’s office in Kensington, Maryland. (GF Ex. 1.) The Notice was sent to the Respondent at his business address of record by both first-class mail and certified mail, return receipt requested. (*Id.*) The certified mailing sent to the Respondent was returned to the OAH marked, “Return to Sender, Not Deliverable as Addressed, Unable to Forward.” The copy of the Notice sent to the Respondent by first class mail, at that same address, was not returned to the

OAH. At the same time, a copy of the Notice was also sent, by certified mail, return receipt requested, to counsel for the Respondent, (*id.*); the OAH received the return receipt reflecting that Respondent's counsel received the Notice.²

Upon return of the certified mailing sent to the Respondent, the MHIC requested that the OAH send a new notice to the Appellant at his home address of record: 10522 Catterskill Court, Columbia, Maryland 21044. (*See* GF Ex. 3.) Accordingly, on January 16, 2019, the OAH sent a copy of the Notice to the Respondent at that address, by both certified and first class mail. (*See* GF Ex. 2.) The January 16, 2019 certified mailing was ultimately returned to the OAH marked, "Return to Sender, Unclaimed, Unable to Forward." The copy of the Notice sent to the Respondent by first class mail on January 16, 2019, was not returned by the postal service.

The Respondent is obligated to keep the MHIC apprised of his current address. *See* Md. Code Ann., Bus. Reg. § 8-309 (requiring a licensee to notify the MHIC of a change of address within ten days). Notice of the hearing was sent to the Respondent by first-class and certified mailing using the MHIC's last known home and business addresses for the Respondent; only the certified mailings were returned for non-delivery. The Respondent's counsel was also sent, and received, a copy of the Notice. The method of notice to the Respondent was reasonably calculated to provide him with notice of the hearing and I concluded that the Respondent received proper notice of the hearing. Md. Code Ann., Bus. Reg. §§ 8-312(d), 8-407(a); Md. Code Ann., State Gov't § 10-209 (2014); *Board of Nursing v. Sesay*, 224 Md. App. 432 (2015). Therefore, the hearing proceeded in the Respondent's absence. Md. Code Ann., Bus. Reg. §§ 8-312(d), (h), 8-407.

² In transmitting this matter to the OAH, the MHIC identified Mr. Sidle, who represented the Respondent in correspondence regarding the MHIC complaint, as counsel for the Respondent. Mr. Sidle did not thereafter separately file an entry of appearance with the OAH. COMAR 28.02.01.08D.

regarding the provisions that must be included in an arbitration clause in a home improvement contracts, however, it is not initialed by the Claimant, as required by law. COMAR 09.08.01.25A, B; (Clmt. Ex. 1, Contract at 7-8, ¶ 24). Further, the Claimant testified that she understood that the arbitration clause was merely optional. The Respondent, despite being represented by counsel, who had a copy of the Contract (*see* Fund Ex. 4), never sought to enforce the arbitration provision or stay this proceeding. In these circumstances, I find that the Contract does not contain a valid, binding arbitration provision that is a bar to the Claimant's claim. Alternatively, even if the Contract contained a valid, binding arbitration provision, it was knowingly waived by the Respondent.

The Claimant is not Barred by the Bankruptcy Claim

Finally, a claimant may not simultaneously pursue a claim against the Fund and a claim for the same loss in a court of competent jurisdiction. Md. Code Ann., Bus. Reg. §8-408(b). The Claimant testified that she filed a claim in the Respondent's bankruptcy proceeding seeking to recover from the Respondent's bankruptcy estate. Generally, the MHIC is to stay a claim for recovery from the Fund if the claimant is concurrently pursuing a claim, arising from the same underlying facts, in another proceeding. Md. Code. Ann., Bus. Reg. § 8-408(b)(2). The MHIC did not stay this proceeding. The Fund, though aware of the bankruptcy claim, took the position that the Claimant was nonetheless eligible for recovery from the Fund.

As a general matter, the prospect of the underlying facts being determined in a decision on the merits in another proceeding would warrant the MHIC staying the claim against the Fund until that other proceeding concludes, with the merits determination in that proceeding dictating whether the Fund pays the claim. *See* Md. Code Ann., Bus. Reg. § 8-408(b). However, here, the Respondent has acknowledged that the Contract work was not performed. (GF Ex. 4; Clmt. Ex. 6.) Further, it is not clear that the bankruptcy proceeding would result in a contested

II. There are No Preliminary Bars to the Claimant's Claim

The Claimant is not in a Precluded Category and Timely Filed the Claim

The statute establishing the Fund and its implementing regulations provide that certain claimants are excluded from recovering from the Fund, regardless of the merits of their claim. The Fund may not pay a claim if: (a) the claimant owns more than three residences and does not reside in the home at issue; (b) the claimant is an employee, officer or partner of the contractor or is related to the contractor or the contractor's employees, officers or partners; (c) the work at issue involved new home construction; (d) the claimant unreasonably rejected the contractor's good faith effort to resolve the claim; or (e) the claimant failed to file the claim with the MHIC within three years of the date the claimant knew of the loss or damage. Md. Code Ann., Bus. Reg. § 8-405(d), (f), (g); COMAR 09.08.03.02G.

The evidence establishes that the work was to be performed on the Claimant's vacation home in Chester, Maryland, and not her residence. Nonetheless, the Claimant owns three, but not more than three, homes. The Claimant is not a relative, employee, officer, or partner of the Respondent; the Claimant is not related to any of the Respondent's employees, officers, or partners. The Claimant did not reject any efforts by the Respondent to resolve the claim, as the Respondent ceased all operations and made no such efforts. The Claimant has not had the work completed. The Claimant timely filed her claim with the MHIC on November 17, 2017. Thus, the Claimant is not within any of the category that would preclude her recovery from the Fund. Md. Code Ann., Bus. Reg. §§ 8-405(d), (f), (g); COMAR-09.08.03.02G.

The Claimant is not Barred by the Contract's Arbitration Provision

A claimant also is required to comply with a binding arbitration proceeding before seeking recovery from the Fund. Md. Code Ann., Bus. Reg. § 8-405(c); COMAR 09.08.03.02E. The Contract contains an arbitration provision that complies with the applicable regulation

adjudication of the merits of the claim. *See* 11 U.S.C. § 502(a) (2016). Finally, it is noteworthy that the applicable law provides for the Fund's ability to maintain a claim for reimbursement against a contractor, such as the Respondent, who has filed for bankruptcy, *see* Md. Code Ann., Bus. Reg. § 8-410(e). In light of the Fund's position and the circumstances at hand, I do not consider the filing of the claim in the bankruptcy proceeding to impact the claim against the Fund.

Having determined there are no preliminary bars to the Claimant's recovery, I consider the merits of the claim.

III. The Merits of the Claim

The Maryland General Assembly created the Fund to provide an available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411. A homeowner is authorized to "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 statutory scheme governing the Fund defines "actual loss" as "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.

At a hearing on a claim, a claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1); COMAR 09.08.03.03A(3). The claimant's burden is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217. To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so[,]" when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). For the reasons explained below, I find that the Claimant has proven eligibility for compensation from the Fund.

The Fund submitted documents establishing that the Respondent was licensed by the MHIC at all relevant times. (GF Ex. 3.)

The Claimant was the sole witness at the hearing; her testimony was succinct but detailed. She supported her testimony with documents. The Claimant testified that she entered into the Contract with the Respondent for construction of an addition to her vacation home in Chester, Maryland; she submitted a copy of the Contract. (*See* Clmt. Ex. 1.) The Claimant stated that she paid the Respondent \$24,000 as a down payment. A copy of the check the Claimant used to pay the Respondent, marked as being deposited by the Respondent, is in evidence. (Clmt. Ex. 2.) The Claimant testified that the Respondent never performed any of the Contract work and is now out of business and in bankruptcy. In support of her testimony on this point, the Claimant submitted a letter from counsel for the Respondent in which counsel acknowledges the Respondent did not perform the Contract and was out of business. (Clmt. Ex. 6; *see also* Clmt. Exs. 5, 7.)

I find that the Respondent abandoned the Contract and failed to complete any of the Contract work at the Claimant's residence. Thus, the Claimant is eligible to recover the amount of her actual loss from the Fund. MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. In this case, as the Respondent did not perform any work under the Contract, the Claimant's actual loss "shall be the amount which the claimant paid to the contractor under the contract." COMAR 09.08.03.03B(3)(a). The Claimant paid the Respondent \$24,000.00 pursuant to the Contract; this is the amount of her actual loss.

By law, a claimant's recovery from the Fund is capped at \$20,000.00 for the acts or omissions of one contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03D(2)(a). Thus, the Claimant's recovery from the Fund is limited to \$20,000.00.

Additionally, recovery from the Fund for all claims against a single contractor is capped at \$100,000, unless and until the contractor reimburses that \$100,000 to the Fund. *See* Md. Code Ann., Bus. Reg. § 8-405(e)(2); COMAR 09.08.03.03D(2)(b). The MHIC has referred other claims involving the Respondent to the OAH.³ In the event that there are claims against the Respondent exceeding the total amount of \$100,000, the Fund is permitted to pay all the claims on a *pro rata* basis or to pay the claims in the order in which they were filed. *See* COMAR 09.08.03.03D(3).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss, limited to the amount of \$20,000.00, 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)(a), D(2). 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 \$20,000.00, or an amount as otherwise limited by application of section 8-405(e)(2) of the Business Regulation article; 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

³ *Cf. Christopher v. Sisk*, 133 Md. 48 (1918) ("we take judicial notice of all papers properly filed in our own court"); *Marks v. Criminal Injuries Compensation Bd.*, 196 Md. App. 37, 77-78 (2010) (comparing official notice of records by an administrative agency to court's judicial notice of official entries in court records).

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.

May 2, 2019
Date Decision Issued

~~EMILY DANEKER~~

Emily Daneker
Administrative Law Judge

ED/cj
#179477

PROPOSED ORDER

WHEREFORE, this 13th day of June, 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.

Andrew Snyder

***Andrew Snyder
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION