

IN THE MATTER OF THE CLAIM	* BEFORE EILEEN C. SWEENEY,
OF YOLANDA ALLEN LITTLE,	* 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 JAMES MARTIN T/A	*
PROMPT RESTORATION, INC.,	* OAH No.: DLR-HIC-02-18-03775
RESPONDENT	* MHIC No.: 18 (05) 589

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On December 14, 2017, Yolanda Allen Little (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$20,000.00 in actual losses allegedly suffered as a result of a home improvement contract with James Martin, trading as Prompt Restoration, Inc. (Respondent).

I held a hearing on May 21, 2018 at the Largo Government Center in Largo, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). The Claimant represented herself. Shara Hendler, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting more than fifteen minutes for the Respondent or the

Respondent's representative to appear, I proceeded with the hearing in the Respondent's absence. Code of Maryland Regulations (COMAR) 28.02.01.23A.¹

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); 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 that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf:

- Cl. Ex. 1A December 6, 2013 letter from PNC Mortgage to the Claimant
- Cl. Ex. 1B November 23, 2013 Authorization for Work; unsigned, undated Notice of Cancellation form; February 19, 2015 Warranty Certificate; June 27, 2014, September 26, 2014 Invoices from the Respondent; December 19, 2013 document entitled "Selections"
- Cl. Ex. 2A-O Photographs

¹ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on March 19, 2018, COMAR 09.08.03.03A(2), and returned as unclaimed/undeliverable on April 12, 2018. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter.

- Cl. Ex. 3 October 5, 2015 email from Jonathan Little to the Respondent; October 8, 2015 email from the Claimant to the Respondent; October 9, 2015 email between the Claimant and the Respondent; October 9, 2015 email from Mr. Little to the Respondent; November 3, 2015 email from the Claimant to the Respondent; November 9, 2015 email from the Claimant to the Respondent; January 13, 2016 email from the Claimant to Rob Coles; February 4, 2016 email from Mr. Little to the Respondent; September 30, 2017 email from the Claimant to herself; October 26, 2017 email from the Claimant to herself
- Cl. Ex. 4A June 28, 2017 letter from Joseph F. Toomey to the Claimant and Mr. Little
- Cl. Ex. 4B December 12, 2017 Estimate from ATC Interior Solutions

The Respondent did not appear at the hearing to offer any exhibits to be admitted into evidence.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 January 26, 2018 Hearing Order
- Fund Ex. 2 March 19, 2018 Notice of Hearing; April 26, 2018 Affidavit of Kevin Niebuhr
- Fund Ex. 3 December 14, 2017 Home Improvement Claim Form
- Fund Ex. 4 May 8, 2018 licensing information

Testimony

The Claimant testified in her own behalf and presented the testimony of the following witnesses:

- Joseph F. Toomey, Pres., Joseph F. Toomey Associates, Inc., who was accepted as an expert witness in home inspections
- Aneudy Manana, owner of ATC Interior Solutions, who was accepted as an expert witness in home improvements

The Respondent did not appear at the hearing to testify in his own behalf and/or present the testimony of any witnesses.

The Fund did not present the testimony of any witnesses.

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 4444809 or 4770628.

2. On November 23, 2013, the Claimant and the Respondent entered into a contract (Contract) for the Respondent to perform restoration work on the Claimant’s home after it was damaged in a fire.

3. The Respondent agreed to compile a detailed scope of work in accordance with insurance industry procedures. The Contract provided that “[t]his scope of work shall be agreed to by the [Respondent], [Claimant] and Insurance Company and shall become part of this agreement.” (Cl. Ex. 1B.) The Claimant was to pay for any work not covered by insurance.

4. The Contract stated that work would begin within ten days from when the Claimant’s Insurance Company and the Respondent had an agreement of scope of repairs and the Respondent’s receipt of a signed work authorization, or the parties had “an agreed scope [of repairs] by the Insurance Company.” (Cl. Ex. 1B.) The Contract did not include a completion date.

5. The original agreed-upon contract price was \$181,408.81.²

6. The Respondent finished working on the project in July 2014.

7. The following payments were made to the Respondent by the Claimant or by her mortgagee/insurance company on her behalf:

• December 18, 2013	\$42,498.52
• March 7, 2014	9,676.19
• March 21, 2014	4,500.00
• May 14, 2014	52,174.71

² In the Home Improvement Claim Form, the Claimant gave the total contract amount as \$145,850.00. She testified that amount may not have included the amount she paid out of pocket.

• July 15, 2014	7,000.00
• July 28, 2014	3,000.00
• August 1, 2014	50,599.45
• September 16, 2014	21,081.29
• Undated	309.61 ³
• Undated	181.01 ⁴
• Undated	5,000.00
• Undated	<u>3,381.71</u>
Total: \$205,402.49 ⁵	

8. In late 2014 (December), the Claimant noticed that the flooring installed by the Respondent was loose, uneven, and had separated in several areas throughout the rooms in which it was installed

9. In spring 2015, the Claimant noticed that several windows throughout the house did not operate properly – window sashes were very difficult to latch or keep open, or would not latch at all. Several windows were difficult to open.

10. Sometime in 2015, the Claimant also noticed the following:

- The retractable cabinet drawer for trash cans was not retracting
- The shoe moulding trim that holds the floor system in place was loose and inadequately secured in several areas
- Bifold closet doors in the basement utility room had fallen out of place and did not stay on the track hardware
- The master bedroom toilet was loose and shifting from side to side
- Walls had buckled and were soft to the touch

11. The Claimant attempted to get the Respondent to perform repairs from the end of 2014 through February 2016, including telephone calls, texts, and emails.

12. On or about October 3, 2015, the Respondent sent one employee to look at the property.

³ This payment was reflected on a September 26, 2014 Invoice from the Respondent with the description “Lowes receipt.” (Cl. Ex. 1B.)

⁴ This payment was reflected on a September 26, 2014 Invoice from the Respondent with the description “Lowes receipt.” (Cl. Ex. 1B.)

⁵ As discussed below, the Claimant was able to prove only that she paid the Respondent \$181,408.00 under the original Contract.

13. Sometime prior to October 5, 2015, the Respondent's Project Manager "Brian" answered the Claimant's telephone call and promised to call her back but failed to do so.⁶

14. On November 10, 2015, the Respondent emailed the Claimant stating that he was "about a month behind in getting the [r]epairs done on Insured's [sic] homes," asking her "to hang in there." (Cl. Ex. 3.) He assured her that warranty items would be done, and stated that he would get to her home as soon as possible. He stated, "Let me look into this and let me see if I can email you a good date." (Cl. Ex. 3.)

15. The Respondent never contacted the Claimant after the November 10, 2015 email and never returned to the Claimant's home.

16. When the Claimant had the home inspected by Joseph F. Toomey of Joseph F. Toomey Associates, Inc., on June 20, 2017, the following defects in the Respondent's work were present, in addition to the above observed by the Respondent:

- Transition strips between sections such as at the kitchen/family room and the master bedroom bath doorway were not properly secured
- Support brackets for the kitchen island countertop overhang were not properly secured, were loose, and were providing no support
- Bifold closet doors in the master bathroom had fallen out of place and did not stay on the track hardware
- At the master bedroom bathroom door, the transition strip between the laminate flooring and ceramic flooring was loose
- The loose bath toilet was not properly secured to the floor and waste line below the toilet
- Drywall seams where the family room addition meets the kitchen were splitting
- The floor of one broom closet kitchen cabinet had split apart
- Utility openings between the outside and the basement laundry room were not sealed
- The latch hardware in the front entry storm door was defective
- The handrails at the stairway between the basement and the main level were loose

⁶ The information in this Finding of Fact was gleaned from an October 5, 2015 email submitted into evidence by the Claimant.

17. The cost for another contractor to repair poor work done by the Respondent is \$14,272.50.

18. The Claimant's actual loss is \$14,272.50.

DISCUSSION

In this case, 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). “[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);⁷ *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual 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.

Licensure

Based on the licensing information provided by the Fund, I find that a preponderance of the evidence establishes that the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant.

⁷ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume of the Maryland Annotated Code.

Unworkmanlike, Inadequate or Incomplete

For the following reasons I find that the Respondent did perform unworkmanlike, inadequate or incomplete home improvements.

The Claimant testified that she entered into a Contract with the Respondent on November 23, 2013 to repair/rebuild her home after it was damaged in a fire. Pursuant to the Claimant's mortgage agreement with PNC Mortgage with regard to insurance loss claim funds, all repairs were to be completed per the Repair/Damage Statement of Loss provided by the Claimant's Insurance Company's adjuster. Completion of repairs would then be verified through inspection by the mortgagee's assigned vendor and additional disbursements made once the inspector verified the work covered by the previous disbursement had been completed. Once repairs were complete, a final inspection would take place and a final disbursement made.

The Claimant testified that the Respondent worked on the project for approximately one year and that she (or the mortgagee on her behalf) paid the Respondent the full Contract price of \$181,408.81.⁸ After the Respondent finished working in July 2014 and approximately two months after the Claimant had moved back in that same month, the Claimant noticed that some work was not done properly.⁹

In December 2014, the Claimant noticed problems with the floors. They were uneven, floorboards were loose, nails were coming out, and the floor boards had separated in several areas.

In spring 2015, the Claimant noticed that the windows were not installed properly – they closed but not enough to meet the latch. The Claimant also noticed sometime in 2015 that the walls had buckled, seams had appeared, and the walls were soft to the touch; shoe moulding was

⁸ As discussed below, invoices showed much more was paid.

⁹ The Claimant did not make clear what problems were visible at that time.

coming up and nails were exposed; closet doors were not properly installed – they were off track and/or had gaps at the top; the toilet in the master bath shifted when someone sat on it; and the retractable cabinet drawer for trash cans was not retracting.¹⁰

The Claimant testified that she tried to get the Respondent to come back to correct his work; she and her husband sent him multiple emails in October and November 2015, he indicated that someone would look into her complaints; however, no one ever returned to the property.¹¹

In June 2017, the Claimant had an inspector (Joseph F. Toomey, Pres., Joseph F. Toomey Associates),¹² look at the property, who found things wrong she had not been aware of.

Mr. Toomey, who was accepted as an expert witness in home inspections, testified that he has conducted inspections for over thirty years for homebuyers, new construction final inspections and analyses of needed repairs. He indicated in his report and testimony that his June 20, 2017 inspection of the Respondent's work showed that floor planks had become detached from adjacent planks in several areas, causing gaps between planks, loose flooring, and uneven flooring. Repairs are needed at each loose and separated floor plank, or if repairs cannot be made, large sections of flooring must be taken up and reinstalled properly.

According to Mr. Toomey, the shoe moulding trim that holds the floor system in place is loose and inadequately secured in several areas. Short pieces are missing in several other areas. Because the shoe moulding holds the floor system in place, it must be re-secured as needed. In addition, the transition strips between sections such as the kitchen/family room and at the master bedroom bath doorway must be properly secured.

¹⁰ An October 5, 2015 email from the Claimant to the Respondent refers to all of those issues.

¹¹ A November 9, 2015 email from the Claimant to the Respondent indicates, however, that she "received a so-called home visit from Stu, who has since disappeared, not to be heard from again." (Cl. Ex. 3.)

¹² Mr. Toomey's report gives an MHIC License number of 29855.

Mr. Toomey further reported the following with regard to windows:

Several windows [throughout] the house do not operate properly, in that the sashes are very difficult to latch, or will not latch at all. Adjustments must be made for each window that is difficult to latch. The difficulty to latch the sashes is due to the window frame having been mounted out of square to the frame of the window opening. Some corrections may require the removal of siding so that the window frame can be remounted square.

Several windows are difficult to open due to misplaced nails or fasteners that have distorted or bent the window sash track. Correcting this installation defect will require removal of the siding in order to be able to remove the misplaced fastener.

One window sash will not stay up when opened as the counterbalance hardware, or possibly, replacement of the window, if the window frame is damaged.

(Cl. Ex. 4A.)

Mr. Toomey found that support brackets for the kitchen island countertop overhang were not properly secured, were loose, and were not providing support. According to Mr. Toomey, the lack of support may result in the overhang section breaking off, and potentially causing serious personal injury.

Mr. Toomey further found that bifold closet doors installed in the master bedroom bath and the basement utility room had fallen out of place and did not stay on the track hardware. He stated that adjustments or replacements are needed so that the doors work properly. A loose bath toilet must be properly secured to the floor and waste line below the toilet.

Mr. Toomey further found: drywall seams where the family room addition meets the kitchen were splitting and must be repaired; the floor of one broom closet kitchen cabinet had split apart and must be repaired in order to make the cabinet usable; utility openings between the outside and the basement laundry room must be sealed to eliminate pest entry into the interior of the home; defective latch hardware in the front entry storm door must be repaired and replaced; and the loose handrails at the stairway between the basement and the main level must be secured in place.

Mr. Toomey testified that he recalled seeing a seam in the drywall; however, he could not tell if it was from shrinkage, settlement or water infiltrating the interior. He testified that it is possible the seam could have been from any of the three.

Mr. Toomey testified that an Estimate from ATC Interior Solutions “lines up with my inspection.” (Toomey Test.)

Aneudy Manana, owner of ATC Interior Solutions (MHIC #114026), was accepted as an expert witness in home improvements. Mr. Manana testified that he has been employed in construction for fifteen years, including home repairs and maintenance. It was his opinion that the work performed by the Respondent was poorly done.

When Mr. Manana inspected the home on December 10, 2017, he found that the floor was “messed up,” and coming apart everywhere. (Manana Test.) It was poorly installed and of poor quality. He would have to take up the sunken floor in the master bedroom to see what is underneath in order to level it, but it was his opinion that all of the flooring has to be rebuilt.

Mr. Manana testified that the front windows need to be replaced and observed that latches on the sides were broken. He will have to take out the siding on part of the house in order to replace the windows. He also needs to replace the doors in the basement, which should have been made of solid wood instead of hollow because so much had to be cut off. He would also fix the leaking, shifting toilet.

Mr. Manana observed water damage from water leaking into the house from where it is overflowing from the gutter. According to Mr. Manana, the Respondent should have put a downspout on the side of the gutters. Mr. Manana will have to remove the gutter in order to install a downspout.

Mr. Manana testified that his \$28,545.00 estimate to perform needed work was fair and reasonable.

Based on the Claimant's testimony and the testimony of her expert witnesses, as corroborated by the photographs taken by the Claimant, I find that a preponderance of the evidence established that the Respondent performed the aforementioned unworkmanlike, inadequate or incomplete home improvements:

I thus find that the Claimant is eligible for compensation from the Fund.

Timeliness

The Fund argued that the part of the Claimant's claim relating to flooring was barred because she did not file it within three years after she discovered it. The Claimant filed a claim against the Fund on December 14, 2017. Section 8-405(g) of the Business Regulation Article provides that "[a] claim shall be brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." Md. Code Ann., Bus. Reg. § 8-405(g) (2015).

I find that the claim for flooring is not barred based on timeliness. The Claimant testified that she noticed the problems with the floor at the end of 2014. On cross-examination, she clarified that this occurred in December 2014. I find that the two statements together are sufficient to show that she probably filed her December 14, 2017 claim within three years of discovery. However, the Claimant is unable to recover any amount for the flooring for other reasons discussed below.

Remedy

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

Using the formula above, I have calculated the Claimant's actual loss as follows:

Amount Claimant has paid to or on behalf of the contractor under original contract	\$181,408.81
Reasonable amounts Claimant has paid or will be required to pay another contractor to repair poor work done by original contractor under original contract and complete original contract	<u>+14,272.50</u>
	\$195,681.31
Original contract price	<u>-181,408.81</u>
Total:	\$14,272.50

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$14,272.50 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 that amount from the Fund. *Id.*

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$14,272.50; 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;¹³ and

¹³ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

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 Claimant has retained or intends to retain another contractor 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 Claimant submitted into evidence two invoices from the Respondent showing that she or her mortgagee/insurance company paid the Respondent a total of \$205,402.49; however, she acknowledged that the original Contract price was \$181,408.81 and could not explain what the additional payments were for.

Mr. Manana's Estimate does not match the Contract exactly. His Estimate calls for the installation of hardwood floors instead of laminated floors. He did not break his Estimate down by item; however, he testified that the flooring represents approximately 50% of the \$28,545.00 estimated cost to repair (\$14,272.50).

ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

Signature on File

August 14, 2018
Date Decision Issued

Eileen C. Sweeney
Administrative Law Judge

ECS/emh
174481

PROPOSED ORDER

WHEREFORE, this 14th day of September, 2018, 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