

IN THE MATTER OF THE CLAIM
OF NANCY BIROTTE,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF DOMINIC HICKS,
WORKING MAN GENERAL
CONTRACTING, LLC,
RESPONDENT

* BEFORE NANCY E. PAIGE,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-18-36600
* MHIC No.: 18 (90) 737
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PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On February 16, 2018, Nancy Birotte (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$24,794.73 in actual losses allegedly suffered as a result of a home improvement contract with Dominic Hicks, trading as Working Man General Contracting, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On November 26, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on March 4, 2019 at the County Office Building in Largo, Maryland. Bus. Reg. § 8-407(e). Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. The Claimant represented herself. After waiting more than fifteen 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.¹

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 on the Claimant's behalf:

- Cl. #1. October 3, 2017 Prince George's County Permit with attached plans
- Cl. #2. September 20, 2017 Discover Card statement
- Cl. #3. November 7, 2017 check from Claimant to Respondent
- Cl. #4. October 18, 2017 84 Lumber receipt

¹ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on December 18, 2018, COMAR 09.08.03.03A(2). The regular mail was not returned. The certified mail was returned marked "vacant, unable to forward" on February 19, 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. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter.

- Cl. #5. Photographs
- Cl. #6. Photographs
- Cl. #7. October 17- December 9, 2017 emails between Claimant and Respondent
- Cl. #8. August 15, 2017 Work Order Contract Agreement (Contract) between Claimant and Respondent
- Cl. #9. December 11, 2017 Prince George's County Inspection Division Correction Order
- Cl. #10. A-I Photographs
- Cl. #11. Photographs
- Cl. #12. Photographs
- Cl. #13. Photographs
- Cl. #14. Undated North Shore Group, LLC contract proposal
- Cl. #15. March 29, 2018 Beltway Builder, Inc. contract proposal
- Cl. #16. April 11, 2018 JB General Contractors, LLC estimate
- Cl. #17. Undated Gee-How Dzyne, LLC Letter of Observation & Correction

I admitted the following exhibits on behalf of the Fund:

- GF #1. November 21, 2018 Hearing Order
- GF #2. December 18, 2018 Notice of Hearing
- GF #3. February 22, 2018 letter from MHIC to Respondent
- GF #4. March 1, 2019 Licensing History

Testimony

The Claimant testified and presented the testimony of her husband, Skarl Alexis.

The Respondent did not attend the hearing. The Fund did not present 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 number 5053971.

2. On or about August 15, 2017, the Claimant and the Respondent entered into a contract to add a master bedroom suite (one bedroom and bath) to Claimant's home (Contract). The Contract stated that work would begin on August 25, 2017 and would be completed by October 25, 2017.

3. The original agreed-upon Contract price was \$35,000.00.

4. The Claimant paid the Respondent as follows:

September 1, 2017 \$7,000.00 (credit card)

November 6, 2017 \$4,000.00 (credit card)

November 7, 2017 \$10,000.00 (check)

5. The Contract provided that all materials were the responsibility of the Respondent. On October 18, 2017, however, the Claimant paid \$3,794.73 for materials, bringing the total paid to or on behalf of the Respondent to \$24,794.73.

6. The Respondent performed some work between September 1, 2017 and November 6, 2017. On December 11, 2017, however, the work failed a framing inspection.

7. The project remains in an unfinished state. The construction performed by the Respondent is not in accordance with the plans approved by Prince George's County.

Defects are so pervasive that the deficiencies cannot be corrected. The unfinished structure must be demolished.

8. The Respondent left the Claimant's property strewn with debris.

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)²; *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.

The Respondent performed unworkmanlike, inadequate and incomplete home improvements. The Claimant did not call an expert to explain the deficiencies in the

² Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

Respondent's work. She offered photographs of the work, which showed incomplete construction of the addition, poorly aligned joints in the framing, unconnected beams, and debris strewn around the property. The Claimant also submitted a county inspector Correction Order which states the following:

1. Not built as per approved plans – must build per approved plans or revise the plans.
2. Must obtain electrical, mechanical, and plumbing permits as applicable.
3. Cannot conduct full framing inspections until all trades are installed.

This is sufficient to establish that the construction is unworkmanlike and/or inadequate.

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.

The Claimant offered a "Letter of Observation & Correction" by Jermaine Howard, Gee-How Dzyne, LLC, that the work performed by the Respondent was deficient and should be demolished. The letter states the cost of demolition would be \$2,000.00 and reconstruction would cost \$38,000.00. The Claimant also offered an estimate from North Shore Group, LLC, in the amount of \$40,000.00, and an estimate from JB General Contractors, LLC in the amount of \$150,000.00. The Respondent failed to appear, so there was no opposing evidence. Both the Gee-How Dzyne and North Shore Group estimates are close to the Contract amount. I therefore find them reasonable. The JB General Contractors' estimate is almost five times the original

contract price and not itemized, with no explanation for the discrepancy. I therefore do not consider it reasonable. All estimates were based upon demolition of the existing unfinished structure. The Claimant testified that she and her husband could not afford to pay to complete the construction. They took a loan to pay for the work, which they must now repay, and they cannot afford another loan.

In this case, the Respondent performed some work under the Contract and the Claimant is not seeking 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 is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor." COMAR 09.08.03.03B(3)(b). The Claimant paid the Respondent \$21,000.00, plus \$3,794.73 for materials covered by the Contract, bringing the total paid to or on behalf of the Respondent to \$24,794.73. Since the work done by the Respondent must be demolished, there is no value in that work to the Claimant, and there will be an additional cost for demolition. Thus, the Claimant's actual loss is at least \$24,794.73, the amount paid to or on behalf of the Respondent.

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 of \$24,794.73 exceeds \$20,000.00. Therefore, the Claimant's recovery is limited to \$20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a). This is less than the amount the Claimant paid to the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss \$24,794.73 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)(b). I further conclude that the Claimant is entitled to recover \$20,000.00 from the Fund. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

RECOMMENDED ORDER

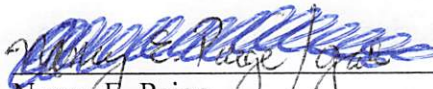
I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$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;³ and

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

May 23, 2019
Date Decision Issued



Nancy E. Paige
Administrative Law Judge

NEP/cj
#179668

³ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 18th day of July, 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.

W. Bruce Quackenbush

***W. Bruce Quackenbush
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION