

IN THE MATTER OF THE CLAIM * **BEFORE STEVEN V. ADLER,**
OF CHRISTOPHER SCHUTTER, * **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 CHARLES EVERS, * **OAH No.: DLR-HIC-02-19-04020**
JR., t/a EVERS HOME * **MHIC No.: 18 (05) 746**
IMPROVEMENTS, *
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 March 28, 2018, Christopher Schutter (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC or Commission) Guaranty Fund (Fund) for reimbursement of actual losses allegedly suffered as a result of a home improvement contract with Charles H. Evers, Jr., trading as Evers Home Improvements (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ On February 4, 2019, the Chairperson of the

¹ All later citations to the Business Regulations Article of the Annotated Code of Maryland are to the 2015 Replacement Volume to the Code.

Commission determined a hearing was warranted on the Claim and three days later on February 7, 2019, the Commission transmitted the matter to the Office of Administrative Hearings (OAH) for an evidentiary hearing.

I held a hearing on the merits of the Claim on June 24, 2019 at the OAH in Hunt Valley, Maryland.² Md. Code Ann., Bus. Reg. § 8-407(e). The Claimant represented himself. The Respondent represented himself. Nicholas Sokolow, Assistant Attorney General, counsel to the Department of Labor (Department), represented the Fund.

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, if any, of the Claimant's compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits in evidence offered by the Claimant:

CL Ex. 1 – Email from Respondent to Claimant, dated July 7, 2017

CL Ex. 2 – Contract, undated

CL Ex. 3 – Revised Building Permit, dated March 1, 2017

CL Ex. 4 – Payments made to Respondent, ranging in dates from July 8 through November 18, 2017

² The case was originally scheduled to be heard on May 28, 2019, and postponed at the Respondent's request.

- CL Ex. 5 – Text messages between Respondent and Claimant, ranging in dates from June 25 through July 22, 2017 and November 15 through December 13, 2017, printed April 26, 2019
- CL Ex. 6 – Text messages between Respondent and Claimant’s spouse, ranging in dates from October 14 through November 16, 2017
- CL Ex. 7 – Text messages between Respondent and Claimant, ranging in dates from November 30 through December 19, 2017
- CL Ex. 8 – List of Completed and Remaining Tasks, undated
- CL Ex. 9a-9p – Photographs of property and garage, ranging in dates from July 31, 2017 through February 28, 2018
- CL Ex. 10 – Home Inspector’s Report, dated March 21, 2018
- CL Ex. 11 – Quote Requirements to finish garage, undated
- CL Ex. 12 – Scope of work to finish garage, Dream Home Improvement, dated February 27, 2018
- CL Ex. 13 – Scope of work to finish garage, Grace Brothers Construction, undated
- CL Ex. 14 – Payments made to Grace Brothers Construction to complete garage, ranging in dates from April 18 through October 26, 2018
- CL Ex. 15 – Structural review and design modifications of garage, Forbes Design Center, LLC, dated April 20, 2018
- CL Ex. 16a-16i – Photographs of garage, dated May 7, 2019
- CL Ex. 17 – Payments made to Grace Brothers Construction for upgrades to garage (scope of work beyond the original contract with Respondent), ranging in dates from June 11 through November 8, 2018

I admitted the following exhibits in evidence offered by the Fund:

- GF Ex. 1 – Notice of Hearing, dated May 28, 2019
- GF Ex. 2 – Hearing Order, dated February 4, 2019

GF Ex. 3 – Department I.D. Registration for Charles Evers, Jr., dated April 30, 2019

GF Ex. 4 – Letter from Home Improvement Commission Chairman to Respondent, dated April 17, 2018

There were no other exhibits offered or admitted.

SUMMARY OF THE EVIDENCE

Testimony

The Claimant testified on her own behalf. The Respondent testified on his own behalf.

The Fund presented no witness testimony.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the proceeding, the Respondent was a licensed home improvement contractor under MHIC registration number 83053.
2. The Claimant is not related to the Respondent or any of his employees, by blood or marriage.
3. The Claimant owns and resides in the subject property and owns no other real property in the State.
4. On July 8, 2017, the Claimant and the Respondent entered into a contract for the Respondent to build a two story, two door garage on the Claimant's property in Dundalk, Maryland.
5. The agreed-upon contract price, including two later change orders, was \$38,764.00 for all labor and materials.

6. On the same date, July 8, 2017, the Claimant paid the Respondent \$12,000.00 by check as advance payment, and made subsequent payments of \$26,764.00 between July 31 and November 18, 2017. The total payment made to the Respondent for work under the contract was \$38,764.00.

7. Work under the contract began in earnest on August 1, 2017.

8. The last day work was performed under the contract was November 18, 2017.

9. As of November 18, 2017, the last day work was performed under the contract, the garage remained incomplete.

10. On a date not established in the record, between December 2017 and January 2018, the Claimant and Respondent met. During this meeting, the Respondent acknowledged he ran out of funds and was unable to complete the contract.

11. The Claimant subsequently contracted with Grace Brothers Construction (Grace Brothers), an MHIC licensed contractor, to complete the garage.

12. Between April 18 and October 26, 2018, the Claimant paid Grace Brothers \$46,717.00 to complete the home improvement work contracted for with the Respondent.

13. The entirety of the work performed by Grace Brothers, costing \$46,717.00, was within the scope of the work of the original contract with the Respondent. The Claimant subsequently contracted with Grace Brothers to perform upgrades to the garage not contemplated in the Claimant's original contract with the Respondent for the additional sum of \$15,200.00.

14. The Claimant is not seeking an award from the Fund for any of the additional monies paid to Grace Brothers beyond the \$46,717.00 paid to complete the work under the original contract with the Respondent.

DISCUSSION

I

Governing Law, Controlling Regulations, and Burden of Proof

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); COMAR 09.08.03.03B(2). Actual loss “means 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. “For purposes of recovery from the Fund, the act or omission of a licensed contractor includes the act or omission of a subcontractor, salesperson, or employee of the licensed contractor, whether or not an express agency relationship exists.” Md. Code Ann., Bus. Reg. § 8-405(b).

At a hearing on a claim for reimbursement from the Fund, the Claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1); COMAR 09.08.03.03(A)(3). The standard of proof is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217 (2014). 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) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

For the following reasons, I find that the Claimant has proven eligibility for an award from the Fund.

II

Positions of the Parties

The Claimant testified that on July 8, 2017, he entered into a contract with the Respondent for the construction of a garage on his property. The Claimant maintained he timely remitted all the monies agreed to under the contract to the Respondent, but the Respondent was unable to complete the contract work and left the garage unfinished, failing to return to the property, and complete the project. As a result, the Claimant contended he was obliged to seek the services of another licensed contractor, Grace Brothers, to complete the work agreed to under the contract with the Respondent. Due to the Respondent's failure to complete the home improvement, the Claimant avers he suffered an actual monetary loss and seeks just compensation from the Fund to redress this loss.

The Respondent did not dispute the Claimant's account of events; candidly acknowledging he did not complete the work agreed to under the contract and left the garage incomplete, an occurrence for which he was felt great regret and remorse, but for which he had no alternative. The Respondent explained the material costs overran the budget for the project, largely due to unexpected circumstances only discovered after work began that resulted in the need for nearly double the anticipated materials; specifically concrete, than originally expected. The Respondent maintained he acted in good faith at all times, performed work under the contract, never squandered the Claimant's monies or converted them to personal use, sought unsuccessfully to put his own monies into the project, and only discovered after the project was more than two-thirds complete that it was underbid and could not be completed for the contract price.

The Fund agreed with the Claimant's position that the Respondent performed an incomplete home improvement, observed that there was no legal impediment to recovery, and recommended the Fund make an award to the Claimant of the statutory maximum of \$20,000.00.

III

Analysis of the Merits of the Claim

There are no material facts in dispute. The parties agree the home improvement at issue was left incomplete on November 18, 2017, by the Respondent, and required the services of another contractor at appreciable expense to complete the project. The Claimant's testimony was delivered clearly, consistently, and sincerely; without any signs of doubt, evasion, falsity, deception or contradiction; and was supported by documentation, including pictures taken contemporaneously with the performance of the work at issue and email and text message correspondence with the Respondent detailing the Claimant's concerns about the Respondent's lack of progress. CL Exs. 1-16; see *B.H. v. Anne Arundel Cty. Dep't of Soc. Servs.*, 209 Md. App. 206, 224-25 (2012). I find the Claimant's testimony and his account of events credible and I give it great weight. See *Dickey v. State*, 404 Md. 187, 202-03 (2008) (factors to be weighed by a fact-finder in assessing credibility); *Maryland Bd. of Physicians v. Elliott*, 170 Md. App. 369 (2006) (a finder-of-fact is authorized to determine the credibility of a witness's testimonial evidence based on the witness's demeanor); *Montgomery Cty. Dep't of Health & Human Servs. v. P.F.*, 137 Md. App. 243, 268 (2001) (the credibility to be given a witness and the weight to be given his testimony is the exclusive province of the finder-of-fact).

There was no expert testimony offered in this case. “It is well settled that expert testimony is required when the subject of the inference is so particularly related to some science or profession that it is beyond the ken of the average layman.” *Wood v. Toyota Motor Corp.*, 134 Md. App. 512, 518 (2000) (internal citations and quotation omitted). The nature of the incomplete work in this case did not require expert testimony to persuasively establish; it was plain and could be easily seen in the Claimant’s photographic evidence. CL Exs. 9a-9p, 16a-16i; *see Suburban Hospital Ass’n v. Hadary*, 22 Md. App. 186, 194 (1974);³ *see also Para v. 1691 Ltd. P’ship*, 211 Md. App. 335, 380 (2013) (expert testimony is not necessary in an agency hearing before a presumably expert hearing office.). Moreover, the Respondent unequivocally agrees he failed to complete the garage due to cost overruns and left the project incomplete on November 18, 2017, his last day of work on the project. There is no contravening evidence in the record before me.

For these reasons, I am persuaded, more likely than not, the home improvement at issue was incomplete, as that term is used in the law and regulations. *See Steinberg v. Arnold*, 42 Md. App. 711, 712 (1979) (“as fact finder, [the judge] has the usual jury prerogatives of whether to believe or disbelieve witnesses, how much weight to give testimony and ultimately whether to be persuaded or not to be persuaded”).

³ In *Suburban Hospital Association*, a hospital stored sterile and nonsterile needles in the same cabinet and a physician used a nonsterile needle in performing a liver biopsy, requiring a patient to undergo a painful series of gamma globulin injections. The Court determined expert testimony was not essential for the jury to determine that storage of the needle was inconsistent with hospital’s obligation to use due care. The Court held that where, as analogous here, an issue of performance is not related to technical matters peculiarly within the knowledge of practitioners in the field, but to circumstances where common knowledge and the experience of reasonable persons can evaluate the conduct of professionals, expert testimony is not essential for the factfinder. *Id.* at 194-95.

Based upon the credible and undisputed evidence of record, I find the Respondent, a licensed contractor, entered into a written agreement with the Claimant to build a garage on his property, accepted and negotiated checks totaling \$38,764.00, which represents the total contract price, and performed work that all parties agree was incomplete. Further, I find there is no dispute that the Claimant is the owner of the subject property and that there are no procedural impediments barring his from recovery from the Fund. Md. Code Ann., Bus. Reg. § 8-405(f), (g); COMAR 09.08.01.13.

I conclude, therefore, that the home improvement at issue here is incomplete within the meaning of the statute, the Claim is not barred by any relevant statutory or regulatory provisions, and the Claimant is eligible for compensation from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405.

V

Award of Compensation from the Fund

Having found eligibility for compensation, I now turn to the amount of the award, if any, to which the Claimant is entitled. The Claimant may not be compensated for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). The Claim sets forth an alleged actual loss of \$38,764.00, which represents the payments the Claimant made to the Respondent under the contract between July 8 and November 18, 2017, and totaling the full contract price. GF Ex. 4; CL Ex. 4.

The MHIC's regulatory scheme offers three formulas for measurement of a claimant's actual loss, unless a unique measurement is necessary. COMAR 09.08.03.03B(3)(a)-(c).

It is undisputed that the Respondent performed some work under the contract. It is equally undisputed that the Claimant solicited Grace Brothers, another licensed contractor, to complete the original contract after the Respondent left the work incomplete. 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). Applying this formula to the facts of the case at bar I add \$38,764.00 (the amount paid to the Respondent) to \$46,717.00 (the amount paid to Grace Brothers to complete the contract) and subtract from this figure \$38,764.00 (the original contract price), which yields the sum of \$46,717.00 (the Claimant's actual loss).

The law and controlling regulations cap a claimant's recovery at \$20,000.00 for the acts or omissions of one contractor, and expressly provide that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Md. Code Ann, 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 \$46,717.00 exceeds statutory maximum of \$20,000.00 and the amount paid to the Respondent. Therefore, the Claimant's recovery is limited to \$20,000.00. Md. Code Ann, Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant sustained an actual loss of \$46,717.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405, § 8-407(e)(1) (2015); COMAR 09.08.03.03(A)(3). I further conclude that the Claimant is entitled to an award of \$20,000.00 from the Fund. *Id.*; COMAR 09.08.03.03B(3)(c), .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 Claimant \$20,000.00;

ORDER that the Respondent is deemed to be ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Maryland Home Improvement Guaranty Fund for all monies disbursed under this Order, plus annual interest of at least ten percent, as set by the Maryland Home Improvement Commission⁴; and

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

Signature on File

September 6, 2019
Date Decision Issued

Steven V. Adler
Administrative Law Judge

SVA/sw
#180881

⁴ Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 23rd day of October, 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