

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF KEVIN LOGAN,</b></p> <p><b>CLAIMANT</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF ANDREA LANG</b></p> <p><b>T/A TOP ELITE DEVELOPMENT</b></p> <p><b>LLC,</b></p> <p><b>RESPONDENT</b></p>	<p><b>* BEFORE STUART G. BRESLOW,</b></p> <p><b>* AN ADMINISTRATIVE LAW JUDGE</b></p> <p><b>* OF THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>* OAH No.: DLR-HIC-02-19-08649</b></p> <p><b>* MHIC No.: 18 (90) 858</b></p> <p><b>*</b></p>
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**PROPOSED DECISION**

STATEMENT OF THE CASE  
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SUMMARY OF THE EVIDENCE  
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RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On April 17, 2018, Kevin Logan (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$190,453.30 in actual losses allegedly suffered as a result of a home improvement contract with Andrea Lang, trading as Top Elite Development LLC (Respondent). Md. Code Ann., Bus. Reg.

§§ 8-401 through 8-411 (2015).<sup>1</sup> On March 21, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on June 19, 2019 at the Prince George's County Office Building, 1400 McCormack Drive, Largo Maryland 20774. Bus. Reg. § 8-407(e). Nicholas Sokolow, Assistant Attorney General, Department of Labor, Licensing, and Regulation<sup>2</sup> (Department), represented the Fund. The Claimant was present and represented himself. The Respondent sent Ahmed Porter to appear at the hearing on behalf of the Respondent. Mr. Porter stated at the hearing that he was not an officer of the Respondent and did not provide a power of attorney from an officer authorizing his representation of the corporation at the hearing. I twice instructed Mr. Porter that it was necessary for the Respondent to provide an authorized power of attorney and that I would conduct the hearing and hold the record open no longer than five days for the Respondent to provide one. Following the hearing, my assistant contacted Mr. Porter several times by phone requesting that the Respondent provide a signed power of attorney; however, the Respondent never did. Maryland law allows non-attorneys to represent business entities only in a limited number of administrative hearings. Section 9-1607.1 of the State Government Article, identifies those areas where non-attorneys may represent a corporate entity. Specifically, Section 9-1607.1(a)(4)(i) provides the following, which allows a non-attorney individual to represent a corporation at a hearing involving the Fund:

- (4) the individual is an officer of a corporation, an employee designated by an officer of a corporation, a general partner in a business operated as a partnership or an employee designated by a general partner, or an employee designated by the owner of a business operated as a sole proprietorship while the officer, partner, or

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<sup>1</sup> Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

<sup>2</sup> The Department of Labor, Licensing, and Regulation is now known as the Department of Labor.

employee is appearing on behalf of the corporation, partnership, or business in an administrative hearing held under:

- (i) § 8-312 of the Business Regulation Article (Home Improvement Commission).

As Mr. Porter was not an officer of the corporation and was not designated by an officer of the corporation to appear on its behalf, I consider the Respondent as failing to appear for the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A. As a result, any argument, motion, or evidence, offered on behalf of the Respondent, as well as Mr. Porter's cross examination of any witness at the hearing will not be considered in my Recommended Order to the MHIC.

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:

- Clmt. Ex. 1 - FHA Homeowner/Contractor Agreement, dated August 29, 2014
- Clmt. Ex. 2 - Hammerhead Contracting Corporation, report on Findings (pgs. 47-92) undated
- Clmt. Ex. 3 - Email correspondence between Claimant and Respondent, March 29, 2015 through January 20, 2016
- Clmt. Ex. 4 - Payments made by Claimant to Respondent
- Clmt. Ex. 5 - Letter from Claimant to Respondent, dated July 30, 2016

Clmt. Ex. 6 - Letter from Claimant to the MHIC, dated June 18, 2019  
I did not admit any exhibits on the Respondent's behalf.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notice of Hearing, dated April 25, 2019

Fund Ex. 2 - Hearing Order, dated March 15, 2019

Fund Ex. 3 - Licensing History of Respondent, dated June 17, 2019

Fund Ex. 4 - Letter from Joseph Tunney, Chairman, MHIC, to Respondent, dated May 7, 2018  
with attached MHIC Claim Form

Fund Ex. 5 - Letter from Kevin Niebuhr, Investigator, MHIC, to Respondent, dated  
October 23, 2018

Fund Ex. 6 - Arbitration correspondence between the American Arbitration Association (AAA)  
and Wendell Robinson, attorney for the Respondent, dated November 1, 2017  
along with a letter from the AAA to the Claimant and Respondent, dated  
January 9, 2018 with attached invoice statement

Fund Ex. 7 - Proof of payments and receipts for payment for the Project

### Testimony

The Claimant testified.

Ahmed Porter testified at the hearing; however, as previously stated, his testimony was  
not considered because he is not an authorized representative of the Respondent.

The Fund did not offer any witnesses to testify.

### **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 5118496.
2. On August 29, 2014, the Claimant and the Respondent entered into a contract  
(Contract) to renovate the Claimant's three story residence (Project). The Contract stated that

work was to begin within thirty days of loan closing with the lender and would be completed by April 16, 2015.<sup>3</sup>

3. The original agreed-upon Contract price, including a contingency, was \$272,369.00. The Project was financed through a Housing and Urban Development (HUD) 203k loan program. Payments to the Respondent were made according to the terms of the loan agreement.

4. Work on the Project was slow. There were numerous rejections by inspectors under building permits for the Project which resulted in delays in order to correct the deficiencies. They included rejection of the foundation-spread footing, concrete pier footing, and concrete flatwork. There were rejections that were not approved for mechanical equipment and no inspections were conducted or approved for the electrical portion of the Project.

5. The Claimant's residence includes an apartment within the residence. The Project included a renovation of the apartment, which would be performed first, so that the Claimant and his wife could live in the apartment while the balance of the residence was under construction.

6. Work on the apartment, like the rest of the Project, was slow. The Claimant communicated the issues concerning the apartment to the Respondent in detail. The Claimant and his wife moved into the apartment, even though it was not completed because of the prohibitive cost of living in a hotel and boarding his pets.

7. The Claimant tried, in good faith, to allow the Respondent additional time to complete the Project by extending the completion date to August 30, 2015 and finally to March 30, 2016. Despite allowing the Respondent additional time to complete the Project, the Respondent did not complete it.

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<sup>3</sup> The Contract specified completion by April 16, 2014, however, that date was inserted in error.

8. Based on the draw requests to the lender who financed the Project and the receipts and checks for payment, the Claimant paid a total of \$173,158.30 to the Respondent for the work performed by the Respondent at the time the Contract was terminated on July 30, 2016.

9. As a result of the failure to perform the Contract as required, the Claimant contacted Hammerhead Contracting Corporation (Hammerhead) to survey the work performed by the Respondent, list the areas that need to be repaired or completed to bring the Project to code and accepted building practices, and provide an estimate of the cost. Hammerhead found recessed lighting off center, bubbling paint, electrical outlets installed not to code, improper cabling, cracks and bulges in drywall, no weather proofing in an old exterior window, improper installation of cabinets, flooring damaged, HVAC not installed properly, the bathroom required reframing, bath fixtures moved to proper location, the roof over the master bedroom, bathroom and closet needed replacing due to numerous code violations, all thirty windows needed to be re-flashed and re-caulked as well as eight doors, the deck needed to be reframed and replaced, a new water feed line that was leaking needed to be repaired, electrical work was incomplete with hanging open wires, which were not inspected, there were broken footings undermining the foundation, and the basement was not properly sealed.

10. As part of an oral agreement with the Respondent, outside of the Contract, the Claimant purchased materials and paid for work that was not completed. The total of these expenses is \$58,827.00. (Clmt. Ex. 6). Of this amount, \$19,750.00 was for materials purchased by the Claimant that was not reimbursed by the Respondent.

11. The Claimant also paid for work that was not performed under the Contract. The total amount for this portion of the Claimant's Claim is \$25,150.00.

12. In addition, the Claimant paid for work that was not completed. Hammerhead estimated that it would cost \$8,927.00 to complete this work.

13. During the course of performing the Project, the Respondent caused damage to the Claimant's residence resulting in a cost to repair the damage estimated by Hammerhead to be \$5,000.00.

14. In addition to the Claimant's Claim for purchased materials and for work that was paid for but not completed, Hammerhead provided an estimate of what it would cost to correct the deficiencies and complete the Project. The estimated amount is \$99,445.00. This figure includes \$10,125.00 for exterior work, \$71,265.00 for the interior of the main house, \$4,745.00 for the main level kitchen, \$2,175.00 for the hall bathroom, \$4,990.00 for the master bedroom, \$875.00 for the laundry room, and a contingency of \$5,270.00.

### **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).<sup>4</sup> “[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.”

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<sup>4</sup> 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 she entered into the Contract with the Claimant.

The Respondent performed unworkmanlike, inadequate or incomplete home improvements. This Project was fraught with problems since its inception. The work performed by the Respondent was unworkmanlike. The Claimant hired a contractor in early 2017 to assess the Project and determine what was necessary to repair and complete the Project. The contractor noted in a detailed report comprising of forty-five pages (Clmt. Ex. 2) all of the deficiencies in the work performed by the Respondent. The total cost to repair and complete the work of the Respondent is estimated to cost \$99,445.00.

The Claimant, with the agreement of the Respondent, purchased materials at his own expense, which was to be reimbursed by the Respondent. The total amount of these purchased items amount to \$19,750.00. The Claimant paid for work that was not completed. The amount for this portion of the Claimant's Claim is \$8,927.00. Additionally, the Claimant paid for work that was not performed. Although the Claimant included a total amount of \$25,150.00 for this work, the Claimant double counted the partition wall, framing the right basement wall past the first door basement floor, the new concrete pad and the new concrete basement floor, additional underpinning and a water heater for a total reduction of \$11,000.00, resulting in a reduction of the Claim equal to \$42,827.00. Finally, although the Claimant claimed \$5,000.00 in consequential damages as a result of damage to the Claimant's property caused by the Respondent, 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). This further reduced this portion of the Claimant's Claim to \$37,827.00.



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. 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).

Applying the formula, the Claimant paid \$173,158.30 to the Respondent. Added to that figure is the amount of \$137,272.00 (\$99,445.00+ \$37,827.00) for the amount paid or will have to be paid to complete the Project for a total of \$310,430.30, less the contract price of \$272,369.00 results in an actual loss of \$38,061.30.

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 \$38,061.30 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). The Fund agrees that the Claimant has met his burden and is entitled to recover \$20,000.00 from the Fund.

**PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual loss of \$38,061.30 and a compensable loss 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)(c). I further conclude that the Claimant is entitled to recover \$20,000.00 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 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; and

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

**Signature on File**

September 18, 2019  
Date Decision Issued

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Stuart G. Breslow  
Administrative Law Judge

SGB/cj  
#182066

**PROPOSED ORDER**

***WHEREFORE, this 26<sup>th</sup> day of November, 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.***

***Lawrence Helminiak***

***Lawrence Helminiak***

***Panel B***

***MARYLAND HOME IMPROVEMENT  
COMMISSION***