

IN THE MATTER OF THE CLAIM	* BEFORE WILLIS GUNTHER BAKER,
OF CONSTANCE SHAFFER,	* 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	*
SJAUNNA GARFINKEL,	* OAH No.: LABOR-HIC-02-20-03242
T/A MARYLAND COMPLETE HOME	* MHIC No.: 19 (75) 1229
IMPROVEMENTS, LTD.,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On May 31, 2019, Constance Shaffer (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),¹ for reimbursement of \$10,529.00 in actual losses allegedly suffered as a result of a home improvement contract with Sjaunna Garfinkel, T/A Maryland

¹ On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

Complete Home Improvements, Ltd (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).² On July 21, 2020, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a remote video hearing on October 15, 2020 via Google Meet. Bus. Reg. § 8-407(e); Code of Maryland Regulations (COMAR) 28.02.01.20B. Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. The Respondent represented herself.

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. 2020); COMAR 09.01.03; and 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. A - Contract, July 31, 2018

Clmt. Ex. B - Scope of Work, July 31, 2018

Clmt. Ex. C - Deposit Check #1492 from the Claimant to the Respondent, July 31, 2018

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

Clmt. Ex. D - Home Improvement Claim Form, May 31, 2019

Clmt. Ex. E - Letter from Claimant to MHIC, March 23, 2019

Clmt. Ex. F - Timeline created by the Claimant

Clmt. Ex. G - Proposed Kitchen Layout Design, July 15, 2018

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

Fund Ex. 1 - Hearing Order, January 15, 2020

Fund Ex. 2 - Hearing Notices and Respondent's Postponement Request, various dates

Fund Ex. 3 - MHIC Notice to the Respondent of the Claim, June 13, 2019

Fund Ex. 4 - Respondent's MHIC Licensing information

The Respondent did not offer any exhibit.

Testimony

The Claimant testified and presented the testimony of David Shipe, her Pastor.

The Respondent testified and did not present other witnesses.

The Fund did not present any testimony.

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 with the MHIC.
2. On July 31, 2018, the Claimant and the Respondent entered into a contract for a complete kitchen renovation (Contract). The Contract estimated that work would begin on September 15, 2018 and would be completed by December 30, 2018.
3. The original agreed-upon Contract price was \$32,487.00.
4. On July 31, 2018, the Claimant paid the Respondent \$10,829.00.

5. The Respondent purchased kitchen cabinets for \$8,000.00, a door for \$1,574.45, and paid an electrician and plumber each \$200 for a site visit, all related to the Respondent's renovation project, and was prepared to begin the project in September 2018.

6. The Claimant had a small home and there was dining room furniture that the Claimant needed to remove before the Respondent could begin the renovation. The furniture was not moved until mid-November 2018.

7. The Claimant became ill in in mid to late November 2018 and asked the Respondent to delay the renovation until after the holidays.

8. On January 20, 2019, the Respondent had a stroke while she was in New York and was incapacitated for about eight weeks.

9. In mid-March 2019, the Respondent began demolition of the Claimant's existing kitchen.

10. On March 18, 2019, the Claimant, the Respondent, David Shipe, and Vernon Krieger³, the Respondent's worker; met to discuss the job and the Claimant terminated the Contract with the Respondent.

11. The Claimant hired Mr. Krieger to continue the project, but he was not licensed. The Claimant paid Mr. Krieger \$19,450.00. Mr. Krieger acknowledged he only had expenses of \$13,100.00 and signed an agreement to return \$6,350.00 to the Claimant.

12. The Claimant paid \$10,000.00 cash to Miguel Ordinez,⁴ an acquaintance of Mr. Krieger, to supply kitchen cabinetry, which was received.

³ Krieger is a phonetic spelling as his name was never spelled by any witness. Mr. Krieger was also referred to as Kaiser (phonetic) by the Claimant.

⁴ Miguel Ordinez is a phonetic spelling as his name was never spelled by any witness. Mr. Ordinez was also referred to as Mike Edwards by the Claimant.

13. The Claimant received financial assistance from her Church's Benevolent Fund as well as volunteer workers to help complete her kitchen renovation.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor. . . ." Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2). "[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 not proven eligibility for compensation.

The Claimant's Case

The Claimant testified that she and the Respondent entered into a contract for the complete renovation of her kitchen on July 31, 2018 and she gave the Respondent a deposit of \$10,829.00. The work was to commence in September, but it did not. The Claimant stated that she tried to contact the Respondent by phone, but the Respondent's voice mailbox was full. The Claimant testified that she is not computer literate and does not use email so the only way she communicates is by phone. The Claimant claimed that there was no communication between the parties for months and that she eventually got her Pastor involved. In the Spring of 2019, the Respondent brought in Mr. Krieger to do the demolition.

The Claimant testified that on March 18, 2019, she met with the Respondent and asked her for a refund of \$8,000.00. The Respondent refused, so the Claimant terminated the contract. The Claimant testified that she asked Mr. Krieger to take over the renovation and he did so, but they did not have a written agreement. The Claimant paid Mr. Krieger numerous checks for time and materials over the next six weeks totaling \$19,450.00. The Claimant testified she also paid a couple of the workers directly because Mr. Krieger had not paid them. Soon after, Mr. Krieger stopped showing up. On May 31, 2019, the Claimant filed her complaint with MHIC.

The Claimant testified that on June 5, 2019, she paid \$10,000.00 cash to a friend of Mr. Krieger, Miguel Ordinez, who she also identified as Mike Edwards, for him to purchase the kitchen cabinets, which he did. The cabinets were later installed by church volunteers.

The Claimant testified that the original kitchen design called for an undercounter washer and dryer, but the salesman discouraged her from purchasing that and she ordered a regular size washer and dryer that did not fit under the counter and required that a laundry closet be built. She stated that the closet and some other changes caused the configuration of the kitchen to change from the original contract design. She testified that the laundry closet did not work out and had to be ripped out and she re-ordered the under-counter washer and dryer.

The Claimant testified that she is only seeking repayment of the deposit money, minus a reasonable fee of \$300.00 to the Respondent for time she spent in meeting with the Claimant looking at flooring and cabinets and was not seeking any further damages. She stated she was not trying to recover the cost associated with the work done by Mr. Krieger or the church volunteers, nor any of the purchases made by the Church Benevolent Fund.

David Shipe, the Complainant's Pastor, testified on behalf of the Claimant. Mr. Shipe stated that the Claimant contacted him in January 2019 and told him that she had entered a contract to have her kitchen renovated in July, but none of the work had started and the Respondent was not returning her calls. Mr. Shipe was able to contact the Respondent's partner from her company website and requested that the Respondent refund the Claimant's deposit since no work had been done.⁵

Mr. Shipe testified that the Respondent showed up in March 2019 with Mr. Krieger to do the "demo" and that all the cabinets and floors were ripped out, all the appliances except for the stove were taken, and the Claimant was left with a stove and sink.

Mr. Shipe testified that he and the Claimant met with the Respondent later in March 2019 and asked for the Claimant's money back and when the Respondent refused, the Claimant terminated the contact with the Respondent and asked Mr. Krieger to continue the work. Mr. Shipe helped the Claimant get the building permits for the job. They began having issues with Mr. Krieger, and the Church stepped in to help the Claimant complete the job through volunteer work and donations from the Church's Benevolent Fund that assists widows like the Claimant. Mr. Shipe testified that the church covered the cost of a window, drywall, insulation, paint, permits, and the plumber and electrician at a cost of \$9,500.00 and used volunteer labor, but the Claimant had to purchase additional items such as the countertops. He testified that the Church is not asking for any reimbursement for its expenses or labor.

⁵ The "partner" was no longer involved with the company at that time and had no authority to speak for the Respondent.

The Respondent's Case

The Respondent testified that she was willing, ready, and able to begin the contract in September 2018, but that the Claimant had large dining room furniture that she was advised needed to be removed before the renovation could begin. The Respondent suggested the Claimant rent a "pod" and assisted with advertising the furniture so the Claimant could sell it, but it was still there throughout September, October and into November. The Respondent testified that she had purchased the kitchen cabinets and a door and had to put them in storage while she waited for the furniture to be moved. By the time the furniture was removed in mid-November, the Claimant had become ill, and the Respondent testified that the Claimant asked that the Respondent wait until after the holidays to begin the kitchen renovation.

The Respondent testified that the Claimant did not have an answering machine, did not use email, and could only be reached by phone if she caught her at home. The Respondent testified that she tried to assist the Claimant in setting up an email account and also tried to communicate through the Claimant's son, but the Claimant was resistant. She stated that they spoke in January about starting work, but then on January 20, 2019, the Respondent had a stroke while in New York and became incapacitated for eight weeks and was unable to communicate with the Claimant. The Respondent stated that as soon as she was able to function and return to Maryland, she hired Mr. Krieger to complete the Claimant's project. They began demo in early March 2019. The Respondent testified that she requested a meeting because the Claimant kept changing the scope of work from what was agreed upon, and that the parties met on March 18, 2019 and the Claimant told the Respondent she was terminating her contract and was proceeding with Mr. Krieger to complete the project. The Respondent stated she was "dumbfounded." The Respondent felt that Mr. Krieger had interfered with her contract and was also concerned that he

was attempting to use her License number and insurance, because he was not licensed himself. The Respondent testified, "I wanted to do the work, was ready to do the work, but wasn't allowed to do the work." The Respondent testified that she was so devastated she left a few days later, went back to New York, and retired from contracting.

The Respondent testified that for the project she had purchased the kitchen cabinets for about \$8,000.00, a door at a cost \$1,574.95 and had paid the plumber and electrician \$200.00 each for a site visit, paid for the drawings, and expended \$360.00-\$390.00 in change orders. The Respondent testified that she told the Claimant at the March 18, 2019 meeting she could have the cabinets at the house in two days because she had them in storage, but the Claimant refused. The Respondent paid for storage of the cabinets until she eventually got rid of them.

Analysis

The Fund argued that actual damages were not demonstrated if the Respondent is to be believed that she purchased the kitchen cabinets but was prevented from completing the job. The Claimant argued that the Respondent did not provide proof that the cabinets were purchased at the time of the March 18, 2019 meeting. The Respondent indicated that she was so shocked at how she was being treated, she did not believe she should have to defend herself at the meeting and that the Claimant had already made her decision to fire her.

I find that the Respondent was a licensed home improvement contractor at the time she entered into the Contract with the Claimant. I further find that from September 2018 to November 2018, the Respondent was ready to do the work, but was prevented from doing so by the Claimant's failure to remove the dining room furniture that needed to be moved before work could begin. I find that in mid to late November the Claimant advised the Respondent that she was ill and did not want the project to start until "after the holidays," i.e. January 2019.

The Respondent had a much better recall of the events related to the Contract. She testified regarding conversations the parties had throughout the process, demonstrating that there had been communication prior to the Respondent's stroke. The Claimant seemed confused and uncertain about timelines but did agree that the Respondent may have been correct about the delays between September and January. On January 20, 2019, the Respondent had a stroke. It is not clear if this was ever communicated to the Claimant, and it appears that there was little, if any, communication between the parties between January 20, 2019 and early March 2019. The Respondent testified that her daughter had been attempting communication with the Claimant during her incapacity, but she was not sure what information was conveyed.

The Respondent began demolition in March 2019 and the parties met on March 18, 2019 regarding the project. At the meeting, the Claimant seemed determined to terminate the Contract. She demanded a refund of \$8,000.00 from the Respondent, who refused to pay because she had already expended monies for cabinets and other items. Both parties testified to lack of communication and difficulty reaching each other between November and March.

The Claimant was clearly confused in her testimony and contradicted herself regarding the timeline, lack of communication, and her own responsibility for the delays. She described voluminous payments she made to Mr. Krieger and others between March and June 2019 and seemed confused as to which checks were cashed and which were either never sent or never cashed. She testified she never had a contract with Krieger but paid him over \$19,000.00 and gave \$10,000 cash to a person she identified as Miguel Ordinez and also as Mike Edwards, stating she believed they were the same person. She was confused with names and dates, and she seemed to have forgotten conversations she had with the Respondent during the relevant time frame.

It is clear that Mr. Shipe got involved because he thought the Respondent had taken advantage of the Claimant, but it was evident at the hearing that the Claimant had caused much of the delay by her own actions and inability to be contacted. It was also clear that the Respondent had been in contact with the Claimant during September through November, despite the Claimant's initial denial. I find that it was the Claimant who prevented work from commencing prior to January 2019.

The Respondent had a stroke on January 20, 2019, and it does not appear that there was any communication with the Claimant for at least a month after that. The Respondent testified that her daughter reached out the Claimant, but she was unsure if she communicated that the Respondent had suffered a stroke and was incapacitated. Obviously, there was some communication in early March 2019 since the Respondent did demolition work at that time at the Claimant's home. On March 18, 2019 the parties met, and the Claimant stated her intention to fire the Respondent and demanded a refund. The Respondent refused to refund any money because she had already done work and purchased supplies.

It is the Claimant's burden to demonstrate that she suffered an actual loss that resulted from an act or omission by the Respondent. Bus. Reg. § 8-405(a); COMAR 09.08.03.03B(2). The Claimant sought to paint a picture of a completely unresponsive contractor, which was not the case. The Claimant was difficult to contact and prevented the work from starting by her failure to remove the furniture until November. She then asked the Respondent to wait until after the holidays to begin the work. It appears that the Claimant did not communicate these issues to her pastor, David Shipe, and it is he who assisted in pursuing the Claim with the Fund because he thought the Claimant had been deceived and robbed by the Respondent.

The Respondent was ready to perform the Contract in September, October and November, but could not continue to reschedule her workers and subcontractors waiting for the Claimant to remove the furniture. Then the illness of the Claimant prevented the Respondent from beginning the work until January. Subsequently, in January the Respondent became ill herself and was unable to begin the work until March. Once she began the work, she was prevented from performing under the Contract by the Claimant's actions in terminating the contract. Therefore, I do not find that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements.

In addition, even if the Respondent was found to have performed an incomplete home improvement, the Claimant failed to demonstrate she had suffered an actual loss. The Claimant argued that the Respondent abandoned the Contract without doing any work, meaning her actual loss would be the amount which the Claimant paid to the Respondent under the contract. COMAR 09.08.03.03B(3)(a). While the Claimant paid the Respondent \$10,820.00, the Respondent demonstrated that she had expended at least that amount on the Claimant's project for cabinets, a door, subcontractors, and demolition, prior to being fired.

Nor are the damages set forth in COMAR 09.08.03.03B(3)(c)(contractor completed some work, other contractors paid to complete) applicable because the Claimant admitted to using unlicensed workers to complete the kitchen renovation, and had donated funds and volunteer worker assistance from her church, none of which are compensable from the Fund. For these reasons, the Claimant is not entitled to recovery from the Fund.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts or omissions and is not entitled to compensation from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's Claim; and

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

CONFIDENTIAL

January 4, 2021
Date Decision Issued

Willis Gunther Baker
Administrative Law Judge

WGB/sw
#189366

PROPOSED ORDER

WHEREFORE, this 17th day of March, 2021, 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

Chairman

Panel B

*MARYLAND HOME IMPROVEMENT
COMMISSION*