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| <p>IN THE MATTER OF THE CLAIM</p> <p>OF LISA GRAZIOLI,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF MARK JOHN</p> <p>WINTERLING,</p> <p>T/A WINTERLING CONTRACTORS,</p> <p>INC.,</p> <p>RESPONDENT</p> | <p>* BEFORE PATRICIA M. DEMAIO,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-22-21064</p> <p>* MHIC No.: 21 (75) 1107</p> <p>*</p> <p>*</p> |
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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
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STATEMENT OF THE CASE

On May 10, 2022, Lisa Grazioli (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of \$20, 634.86 in actual losses allegedly suffered as a result of a home improvement contract with Mark Winterling, trading as Winterling Contractors, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015 &

Supp).¹ On August 5, 2022, the MHIC issued a Hearing Order. On August 16, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing. On December 13, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Johnathan Phillips, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. The Respondent represented himself.

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 (2021); Code of Maryland Regulations (COMAR) 09.01.03; and COMAR 28.02.01.

ISSUES

1. Was the Claim timely filed?
2. If so, did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
3. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 Home Improvement Contract between the Claimant and the Respondent, August 1, 2018
- Clmt. Ex. 2 Claimant's Summary, June 11, 2021
- Clmt. Ex. 3 Emails between the Claimant and Mike Poole, November 2, 2021; Poole Contracting & Consulting Proposal, February 19, 2019

¹ Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

- Clmt. Ex. 4 MHIC Order, June 23, 2021 with attachments:
- Correspondence from the Respondent to David Finneran, Executive Director, MHIC, June 25, 2021
 - Home Improvement Contract between the Claimant and the Respondent, unsigned, August 1, 2018
 - Accounting from the Respondent to the Claimant, December 14, 2018
 - Emails between the Respondent and the Claimant, December 14, 2018
- Clmt. Ex. 5 Text messages between the Claimant and the Respondent, November 13, 2018 through December 14, 2018
- Clmt. Ex. 6 Letter from the Claimant to the Respondent and Check No. 3504, November 21, 2018 with attachments:
- Taylor Bank Stop Payment Form, December 15, 2018
 - \$2,225.00 check paid by the Claimant to the Respondent, August 2, 2018
 - \$2,225.50 check paid by the Claimant to the Respondent, October 11, 2018
 - \$3,951.00 check paid by the Claimant to the Respondent, November 26, 2018
- Clmt. Ex. 7 Email from the Respondent to the Claimant, December 1, 2018 with attachments:
- Accounting from the Respondent to the Claimant, December 1, 2018²
 - Emails between the Appellant and the Respondent, December 14, 2018
 - Accounting from the Respondent to the Claimant, December 14, 2018
- Clmt. Ex. 8 Photographs of the Claimant's Master Bathroom, undated³

I admitted the following exhibits offered by the Respondent:⁴

- Resp. Ex. 16 Response to Claim, No. 1 – 13, undated
- Resp. Ex. 17 Response to Claim, No. 14 – 17, undated
- Resp. Ex. 18 Respondent's Statement, undated

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 Notice of Remote Hearing, September 12, 2022
- Fund Ex. 2 Hearing Order, August 5, 2022

² There are four copies of the same document.

³ The Claimant submitted twenty color photographs as well as a black and white xerox copy of each photograph.

⁴ The Respondent's exhibits 1 through 15 were not offered or admitted into evidence but were retained in the file. COMAR 28.02.01.22C.

Fund Ex. 3 Notice of Claim from the MHIC to the Respondent, May 11, 2022 with attachment:

- MHIC Home Improvement Claim Form, received May 10, 2022

Fund Ex. 4 Maryland Department of Labor, I.D. Registration, December 4, 2022

Testimony

The Claimant testified and did not present other witnesses. The Respondent testified and did not present other witnesses. The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC personal license number 01-49113 and corporate license number 05-121905. (Fund Ex. 4).

2. The Claimant's property subject to this matter is located in Ocean Pines, Maryland (Property).

3. On August 2, 2018, the Claimant and the Respondent entered into a home improvement contract for the Respondent to renovate the master bathroom (bathroom project) at the Property (Contract). The scope of work as outlined in the Contract included:

- Removal and disposal of all wall and floor tile in the shower;
- Removal and disposal of mud pan and hardy board;
- Installation of new mud pan and hardy board;
- Installation of new wall and mosaic floor tile;
- Disconnect plumbing and remove vanities and marble top;
- Installation of vanities supplied by the Claimant;
- Installation of granite counter tops to be supplied by the Claimant;
- Removal and disposal of heat lamp/exhaust and installation of two fan light combo supplied by the Claimant; and
- Paint bathroom with two coats of Sherwin Williams pro 200 latex paint.

4. The original agreed-upon Contract price was \$8,890.00⁵ (Clmt. Ex. 1).
5. The Contract did not specify start or completion dates. (Clmt. Ex. 1).
6. On August 2, 2018, the Claimant paid the Respondent a \$2,225.00 deposit toward the Contract price. (Clmt. Exs. 1, 6; Resp. Ex. 16).
7. On or about August 18, 2018, the Respondent began working on the Property. The Respondent hired a subcontractor, David Francia, to work on the bathroom project. (Clmt. Ex. 2).
8. On October 11, 2018, the Claimant paid the Respondent \$2,225.50 toward the Contract price. (Clmt. Exs. 2, 6).
9. On November 13, 2018, the Respondent sent the Claimant a text message notifying the Claimant that the bathroom renovation was complete and requested payment. (Clmt. Ex. 5).
10. On November 26, 2018, the Claimant paid the Respondent an additional \$3,951.00 toward the Contract price.⁶ (Clmt. Ex. 6). The Claimant withheld the final \$500.00 due pending the final walkthrough.
11. On December 1, 2018, the Respondent emailed the Claimant an “accounting” wherein he billed the Claimant an additional \$1,500.00 for materials purchased and labor performed on the bathroom project. The additional materials and labor included:
 - Purchased and installed Moen Brushed Nickel faucet and shower head:
\$625.00;

⁵ The total Contract price is listed as \$8,890.00. However, the Contract specifies that payment should be made in four installments of \$2,225.50 each. The total of the four installment payments is \$8,902.00. (Clmt. Ex. 1). The discrepancy was not explained.

⁶ The Claimant originally issued payment on November 21, 2018. The check was lost, so the Claimant stopped payment on that check and reissued payment on November 26, 2018.

- Installed metal trim in place of bull nose tile: \$175.00;
- Installed recessed boxes and tile: \$600.00; and
- Repaired drywall ceiling because fan purchased did not fit: \$100.00.

(Clmt. Ex. 7).

12. The Claimant did not object to the additional \$1,500.00.

13. On December 8, 2018, the Claimant conducted a final walkthrough of the property with the Respondent's subcontractor. (Clmt. Ex. 2).

14. During the final walkthrough, the Claimant identified several issues with the quality of work performed on the bathroom project. (Clmt. Ex. 2).

15. Between December 8, 2018 and December 14, 2018, the Claimant sent the Respondent several text messages complaining about the quality of work performed and requesting that the Respondent call her to discuss the matter.

16. On December 14, 2018, at 8:38 a.m., the Respondent emailed the Claimant an "accounting" wherein he billed the Claimant \$700.00 for additional work requested by the Claimant.⁷ (Clmt. Ex. 2).

17. The additional work included:

- Remove all switches in electrical box and install a two switch box, repair drywall: \$400.00
- Skim coat ceiling with drywall mud, sand and paint: \$300.00

18. On December 14, 2018, at 12:27 p.m., the Claimant emailed a stop work notification to the Respondent. (Clmt. Ex. 4).

⁷ The total amount requested was \$2,700 which included the \$500.00 balance from the original Contract price and the \$1,500.00 in additional work from the December 1, 2018 accounting. (Clmt. Ex. 4).

19. On February 19, 2019, the Claimant obtained a proposal from Poole Contracting & Consulting to remediate and remodel the master bathroom at the Property. The proposal amount was \$13,787.41 which included labor, materials, and scraping/sanding smooth the bathroom ceiling.⁸ (Clmt. Ex. 3).

20. On May 10, 2022, the MHIC received the Claimant's Home Improvement Claim Form. (Fund Exs. 2, 3).

DISCUSSION

Legal Framework

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 (2021); 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 Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). Regarding the burden of persuasion and the weight of evidence, a trier of fact can properly accept all, some, or none of the evidence offered. *See Sifrit v. State*, 383 Md. 116, 135 (2004); *Edsall v. Huffaker*, 159 Md. App. 337, 341 (2004).

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) (Supp 2022); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for 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.

⁸ Without smoothing the bathroom ceiling, the estimate is \$13,287.41.

Certain claimants are excluded from recovering from the Fund altogether for failing to meet the statutory requirements. In this regard, a claim is legally sufficient if: (1) the claimant resides in the home as to which the claim is made, or owns no more than three dwelling places; (2) the claimant is not an employee, officer or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (3) the work at issue did not involve new home construction; (4) the claimant did not unreasonably reject the contractor's good faith effort to resolve the claim; (5) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (6) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (7) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Bus. Reg. §§ 8-405(c), (d), (f), and (g) (Supp. 2022); Bus. Reg. §§ 8-408(b)(1), (3); Bus. Reg. § 8-101(g)(3)(i) (Supp. 2022).

Statutory Eligibility

Several of the factors necessary to establish statutory eligibility can be disposed of easily. The home improvement work was to be performed on a residential property in Maryland and did not involve new construction. While the Property is not the Claimant's primary residence, the Claimant does not own more than three residences or dwelling places. The Claimant is not a relative, employee, officer, or partner of the Respondent; the Claimant is not related to any of the Respondent's employees, officers, or partners. The Claimant did not reject any efforts by the Respondent to resolve the claim. The Contract between the Claimant and the Respondent does not contain an arbitration provision. Additionally, the Claimant has not taken any other legal action to recover financially for the same loss and the Claimant did not recover for the actual loss

from any source. Bus. Reg. §§ 8-405(c), (d), (f) (Supp. 2022), Bus. Reg. § 8-408(b)(1), (3); Bus. Reg. § 8-101(g)(3)(i) (Supp. 2022).

The remaining factor requires more discussion. The Fund argued that pursuant to Maryland law, the Claimant may not be eligible for an award from the Fund because the Claim was filed beyond the three-year statute of limitations period. *See* Bus. Reg. § 8-405(g). The Fund emphasized that the Claimant did a walkthrough at the Property on December 8, 2018. As a result, the Claimant discovered issues with the quality of the work performed on the bathroom project. The Fund contends that December 8, 2018, is the triggering date for statute of limitations purposes. As such, the Claim should have been filed within three years of that date.

The Claimant argued that on December 14, 2018, after receiving a request for additional payment from the Respondent, she realized the issues she had with the renovations would not be repaired unless she paid the Respondent additional funds. Accordingly, she issued the stop work order that day. The Claimant contended that December 14, 2018, is the triggering date for the statute of limitations analysis. The Claimant averred that although the Claim is dated December 11, 2021, she filed her Claim on June 11, 2021, by regular mail and email. The Claimant asserted that because of the impact the COVID-19 pandemic had on her family, she had a lot of stress in her life which led to the delay with filing the Claim. The Claimant emphasized that she filed the Claim timely and requested that I find the Claim compensable.

Section 8-405(g) 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.” *Id.* The statute of limitations is generally a legislative recognition that memories fade over time and prevents effective defense against a claim. The Supreme Court of Maryland⁹

⁹ The Maryland Court of Appeals was renamed the Supreme Court of Maryland on December 14, 2022.

(Supreme Court) addressed the reason for such a limitation in *Haas v. Lockheed Martin Corporation*, 396 Md. 469 (2007), where the Court observed:

One principal purpose of statutes of limitations is to provide defendants with notice of a claim within a sufficient period of time to permit the defendant to take necessary steps to gather and preserve the evidence needed to defend against the suit. From the defendant's perspective, the statute of limitations is remedial. Once the limitation period passed, the statute, which once provided opportunity, closes the window and the claim is barred thereafter. The legislature, in drafting such legislation, implicitly recognizes that as time passes, difficult evidentiary issues arise, such as proof of the cause of injury, faded memories, and the availability of witnesses. Statutes of limitation are also meant to eliminate, after the allotted time, the financial uncertainty defendants experience while potential claims remain unlitigated. The time allotted usually has little, if any, specific grounding in empirical logic, but simply represents the legislature's judgment about the reasonable time needed to institute suit.

Id. at 498-99 (internal quotation marks and citations omitted).

In *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435 (2000), the Supreme Court analyzed the question of when, for statute of limitation purposes, a litigant is put on notice of a problem. *Lumsden* was a civil case rather than an administrative proceeding, but it is nevertheless instructive. The Plaintiffs in *Lumsden* had driveways installed. Their driveways subsequently began peeling and scaling. At first, the likely cause of the problems appeared to be chemicals used in de-icing and snow removal. Some months later, the Plaintiffs learned that the problem was more likely due to issues with the original installation and the composition of the concrete itself.

The Plaintiffs filed suit three years and one month after the original discovery of the driveway problems. Their cases were dismissed for lack of timely filing at both the district and circuit court levels, and the Plaintiffs appealed, arguing that the three-year statute of limitations did not begin to run when they discovered the problems with their driveways, but rather it began to run when they found out that the likely specific cause was the faulty concrete.

The Court disagreed, holding that the running of limitations commenced “when petitioners first discovered that their respective driveways had been damaged and not . . . when they discovered the purported cause of the damage.” *Id.* at 440. The Court further elaborated:

The statute of limitations begins to run when claimants gain knowledge sufficient to put them on inquiry notice generally when they know, or should know, that they have been injured by a wrong. From that date forward, a claimant will be charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation, regardless of whether the investigation has been conducted or was successful.

Id. at 452.

The Court further discussed the reasons behind statutes of limitation:

By creating a limitations period, the legislature determined that a plaintiff should have only so long to bring his action before he is deemed to have waived his right to sue and to have acquiesced in the defendant’s wrongdoing. Limitations statutes therefore are designed to (1) provide adequate time for diligent plaintiffs to file suit, (2) grant repose to defendants when plaintiffs have tarried for an unreasonable period of time, and (3) serve society by promoting judicial economy.

Id. at 442.

Here, the facts are largely undisputed. On December 8, 2018, after viewing the bathroom renovation, the Claimant contacted the Respondent and notified him of several issues she had with the quality of work performed on the bathroom project. Based on the evidence before me, I find that the Claimant knew of the alleged deficiencies in the Respondent’s work beginning on December 8, 2018. As such, the Claimant had until December 8, 2021, to file her Claim with the Fund. Subsequent attempts to meet, discuss the matter, or fix the problem did not toll the statute of limitations.

On or about June 11, 2021, the Claimant filed a Complaint. A complaint is not the same as a Claim. The Claim form specifically seeks recovery from the Fund. I do not find the Claimant’s argument that she filed her Claim on June 11, 2021 persuasive because it is not

supported by the evidence. The Claim form is dated December 11, 2021, and signed by the Claimant. (Fund Ex. 3.) Additionally, the Claim form is dated received by the MHIC on May 10, 2022. Similarly, the Hearing Order states that the Claimant filed the Claim on May 10, 2022. Likewise, the letter notifying the Respondent of the Claim is dated May 11, 2022, which corroborates that the Claim was received on May 10, 2022. At the hearing, the Claimant was unable to produce any exhibits or plausible explanation that supported her position that she filed the Claim on June 11, 2021 or December 11, 2021.

To the extent that the Claimant's testimony and the Fund's exhibits are contradictory, I find the Fund's exhibits the most reliable evidence regarding the date the Claim was filed. (Fund Exs. 2, 3). I am sympathetic to the issues the Claimant and her family faced as a result of the COVID-19 pandemic. However, the credible evidence before me is that the Claim was filed on May 10, 2022, which is well beyond the three-year statute of limitations period. (Fund Exs. 2, 3).

Accordingly, I find that the Claimant failed to adhere to the three-year limitation period, and as a result she is not eligible for compensation from the Fund. Bus. Reg. § 8-405(g). Having made this determination, I need not determine whether the Claimant suffered and actual loss due to the acts or omissions of the Respondent.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant's claim against the Home Improvement Guaranty Fund is barred by the three-year statute of limitations. Md. Code Ann., Bus. Reg. § 8-405(g) (2015); *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435 (2000).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission **ORDER** that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and, further **ORDER** that the records and publications of the Maryland Home Improvement Commission reflect this decision.

March 6, 2023
Date Decision Issued

Patricia M. DeMaio

Patricia M. DeMaio
Administrative Law Judge

PMD/cj
#203812

PROPOSED ORDER

WHEREFORE, this 24th day of April, 2023, 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.

Robert Altieri

Robert Altieri

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**