

IN THE MATTER OF THE CLAIM	*	BEFORE MICHAEL R. OSBORN,
OF JAY S. WENDEL,	*	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 DAVID TORRES, II,	*	
T/A A & D CONTRACTING	*	OAH No.: LABOR-HIC-02-22-28178
SERVICES, LLC.	*	MHIC No.: 22 (75) 1004
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 August 12, 2022, Jay S. Wendel Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$4,611.32 for actual losses allegedly suffered as a result of a home improvement contract with David Torres, II., trading as A & D Contracting Services, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).²

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).

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

Clmt. Ex. 7 - Emails between Claimant and Respondent, 5/10/2021 and 5/11/2021

Clmt. Ex. 8 - Estimate, CertaPro Painters, 8/2/2022

Clmt. Ex. 9 - Six photographs, undated

I admitted the following exhibits offered by the Respondent:

Resp. Ex. 1 - Answer to Complaint, undated

Resp. Ex. 2 - Emails between Claimant and Respondent, 5/10/2021 and 5/11/2021

Resp. Ex. 3 - Claimant email to Respondent, 11/29/2021

Resp. Ex. 4 - Text messages 3/26/2021 through 12/7/2021

Resp. Ex. 5 - Emails between Claimant's wife and Respondent, 12/1/2020 through 12/22/2020

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, 12/7/2022

Fund Ex. 2 - Hearing Order, 10/26/2022

Fund Ex. 3 - Respondent's licensing history, 12/20/2022

Fund Ex. 4 - Claim, 8/12/2022

Fund Ex. 5 - MHIC letter to Respondent, 8/31/2022

Fund Ex. 6 - Hand drawing of bathroom, 1/31/2023

Testimony

The Claimant testified and did not present other witnesses. The Respondent testified and did not present other witnesses. The Fund did not present 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 01-115803.

2. On December 1, 2020, the Claimant and the Respondent entered into a contract (Contract) to renovate a bathroom in the Claimant's home.

3. The scope of the work to be performed by the Respondent included:

- demolish the existing shower, floor, tub, vanity, lights, and ceramic wall tub;
- furnish and install a free-standing tub and faucet;
- furnish and install a new double-sink vanity, sink top, undermount sinks and faucets;
- furnish and install new mirrors and sconce lighting;
- furnish and install new porcelain ceramic floor, full-height tile shower surround, and tile wainscot around the tub;
- paint all drywall;
- install ceiling vent fan through roof;
- furnish and install down lights;
- install ceramic tile baseboards with metal-finish edge;
- furnish and install heat mats under the floor tile along with wiring a thermostat;
- furnish and install glass shower enclosure with door;
- install a new diverter with new shower head and drain;
- furnish and install a new mud pan with ceramic tile;
- install niche in shower surround;
- paint existing door and window trim.

4. The agreed-upon Contract price was \$31,600.00, which was orally modified to \$29,000.00 by the parties because the Claimant provided some of the materials.

5. During discussions between the Claimant and the Respondent regarding the heated-floor portion of the scope of work to be performed, the Respondent explained that the Claimant could choose between heated floor options. The Respondent explained that one option was to install a "Schluter" type floor warming system, which would warm the entire bathroom floor. The Respondent explained that a second option would be to place warming mats of a fixed size under the floor tile at specific locations - in front of the tub and shower, and in front of the vanity and toilet. The Respondent explained that a Schluter type floor warming system would be more expensive than the fixed-size-mats option. The Claimant opted for the warming mats option.

6. On or about February 24, 2021, the Respondent began work under the Contract. The Claimant paid the Respondent \$10,500.00 on that date.

7. The Respondent continued to perform work under the Contract. On March 15, 2023, the Claimant paid the Respondent \$10,500.00.

8. Sometime during performance of the Contract, the Claimant pointed out to the Respondent that workers were installing the tile floor where there were no warming mats in place. The Respondent instructed the workers installing the floor to install warming mats in front of the tub and shower and in front of the vanity and toilet. The flooring installers did so.

9. The Respondent completed work under the Contract on April 6, 2021. All work was completed and was to the Claimant's satisfaction.

10. On April 8, 2021, the Claimant paid the Respondent \$8,000.00 due as final payment under the Contract, plus a \$1,000.00 cash bonus for work well done.

11. In fall 2021, as the weather cooled, and the Claimant put the floor warming system into use, the Claimant was unhappy with the performance of the floor warming system installed by the Respondent.

12. The Claimant complained about the poor performance of the floor warming system to the Respondent. The Respondent sent electricians to the Claimant's home to rectify what the Claimant described as inconsistent performance of the floor warming system, and what the Claimant described as only a few warm floor tiles, or only some rows of floor tiles being warm.

13. The Respondent added additional warming pads on the basement ceiling, under the bathroom floor between floor joists, in areas where the Claimant complained the floor was not warm, and installed reflective insulation on the floor joists to ensure any heat radiating from the additional pads was directed to the bathroom floor above and did not radiate toward the basement.

14. The Claimant did not respond to efforts by the Respondent to schedule a time for an electrician to visit the Claimant's home to install a thermostat to regulate the warming pads installed on the basement ceiling under the bathroom floor.

15. On August 2, 2022, the Claimant obtained an estimate in the amount of \$7,211.32 from CertaPro Painters to remove bathroom floor tiles, reposition and inspect radiant heat pads, and retile and regrout the Claimant's bathroom floor. The cost estimate included replacement of any floor warming pads determined to be faulty, and any necessary electrical adjustments.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov't § 10-217; 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).

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. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant’s recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022). The Claimant resides in the home that is the subject of the claim or does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2022).

The Claimant was happy with the floor warming system when the Respondent demonstrated to the Claimant how to use the floor warming system thermostat in April 2021. The Respondent pointed out the two areas of the bathroom floor that would be warmed, and turned the thermostat up so the Claimant could feel the now-warming floor for himself.

The Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2022). Over a course of months starting in fall 2021, when the Claimant complained about the poor performance of the floor warming system, the Respondent sent electricians to the Claimant’s home to rectify what the Claimant described as inconsistent

performance of the floor warming system, and what the Claimant described as only a few warm floor tiles, or only some rows of floor tiles being warm. The Respondent added additional warming pads on the basement ceiling, under the bathroom floor between floor joists, in areas where the Claimant complained the floor was not warm, and installed reflective insulation on the floor joists to ensure any heat radiating from the additional pads was directed to the bathroom floor above and did not radiate toward the basement. The Claimant did not respond to efforts by the Respondent to schedule a time for an electrician to visit the Claimant's home to install a thermostat to regulate the warming pads installed on the basement ceiling under the bathroom floor.

The Respondent did not perform unworkmanlike, inadequate, or incomplete home improvements. The parties had different understandings of the type of floor warming system that the Respondent was to install and how much of the floor would be warmed. The Claimant believed the entire floor would be warm, the Respondent believed only parts of the floor would be warm. The Respondent testified that he explained the floor heating options to the Claimant, one option being a Schuler-type system that would warm the entire floor, and the option being warming pads at certain locations, only. The Respondent testified that the Claimant opted for the less-expensive warming pads. This testimony is consistent with the written response the Respondent provided to the MHIC in response to the March 8, 2022, Complaint submitted to the MHIC from the Claimant. In that Complaint, the Claimant stated, "at one time when the tiles were being installed, we noticed there were no heating pads under the tile." The Contract recites "furnish and install heat mats under the floor tile along with wiring a thermostat." I find that the Respondent agreed to install a floor warming system that would warm only parts of the floor.

The Claimant testified that the warming pads worked but did not warm the floor in the parts of the floor where he wanted it to be warm. He testified that he thought the warming pads installed must be faulty, and that the floor warming system installed did not perform to his satisfaction. His only support for the conclusion that the warming pads must be faulty was an estimate from CertaPro Painters that to resolve the unsatisfactory performance of the warming pads the entire bathroom floor would have to be torn out and any warming pads determined to be faulty would be replaced. This estimate made no reference to any finding by CertaPro Painters that the warming pads already installed were in fact faulty.

The Claimant and the Respondent had different understandings of the work to be performed under the Contract, and different expectations of the performance of the floor warming system. The Respondent performed work under the Contract as he understood his contractual obligations in a workmanlike, complete, and adequate fashion. The Respondent installed additional floor warming mats under the bathroom floor where the Claimant complained the floor was not warm, but the Claimant did not respond to efforts by the Respondent to send an electrician to complete the installation. The Claimant's failure to respond to these efforts to address the Claimant's complaints about the performance of the floor warming system was unreasonable.

I thus find that the Claimant is not eligible for compensation 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. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(2). I further conclude that the Claimant is not entitled to recover from the Fund.

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.

April 25, 2023
Date Decision Issued

Michael R. Osborn

Michael R. Osborn
Administrative Law Judge

MRO/sh
#204676

PROPOSED ORDER

WHEREFORE, this 26th day of June, 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.

Lauren Lake

Lauren Lake

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**