

<p>IN THE MATTER OF THE CLAIM</p> <p>OF ALLEN AND REGINA SMITH,</p> <p>CLAIMANTS</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF STEVEN LOZINSKY,</p> <p>T/A AMERICAN HOME</p> <p>CONTRACTORS LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE DANIA AYOUBI,</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>*</p> <p>* OAH No.: LABOR-HIC-02-23-11525</p> <p>* MHIC No.: 22 (75) 1250</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On August 24, 2022, Allen and Regina Smith (Claimants)¹ filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)² Guaranty Fund (Fund) for reimbursement of \$18,556.80 for actual losses allegedly suffered as a result of a home improvement contract with Steven Lozinsky, trading as American Home Contractors, LLC (Respondent).³ Md. Code

¹ References to “the Claimants,” in the plural, are to Allen and Regina Smith. References to “the Claimant,” in the singular, are to Regina Smith.

² The MHIC is under the jurisdiction of the Department of Labor (Department).

³ The Claim was signed by the Claimant on July 14, 2022 and received at the MHIC on August 24, 2022.

Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).⁴ On April 10, 2023, the MHIC issued a Hearing Order on the Claim. On April 20, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) to schedule and conduct a hearing.

On July 20, 2023, I held a remote hearing by video. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). Jonathan Phillips, Assistant Attorney General, Department, represented the Fund. The Claimants were self-represented. The Respondent was self-represented.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimants 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 offered by the Claimants:

- Clmt. Ex. 1 - Correspondence from the Office of the Attorney General's (OAG) Consumer Protection Division to the Claimants, April 2, 2022, with the following attachments:⁵
- Complaint Information Summary, undated
 - Receipt from the Respondent to the Claimants, undated
 - Proposal from the Respondent to the Claimants, May 6, 2015
 - Contract between the Respondent and the Claimants, June 22, 2015
 - Materials order sheet, August 5, 2015

⁴ Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

⁵ The Claimants filed a complaint against the Respondent with the OAG that was ultimately unsuccessfully resolved. Thereafter, the OAG referred the complaint to the MHIC.

- Copy of deposited check from the Claimants to the Respondent, September 9, 2015
- Copy of cashier's check from the Claimants to the Respondent, September 2, 2015
- Manufacturer's promotional materials, undated
- Email correspondence between the OAG and the Claimants, August 12, 2021
- Email correspondence from the Claimants to the OAG, January 10, 2022
- Receipt from the Respondent to the Claimants, undated (duplicate)
- Proposal from the Respondent to the Claimants, May 6, 2015 (duplicate).
- Contract between the Respondent and the Claimants, June 22, 2015 (duplicate)
- Materials order sheet, August 5, 2015 (duplicate)
- Copy of deposited check from the Claimants to the Respondent, September 9, 2015 (duplicate)
- Copy of cashier's check from the Claimants to the Respondent, September 2, 2015 (duplicate)

Clmt. Ex. 2 - Correspondence from the MHIC to the Claimants, April 10, 2023, with the following attachments:

- Correspondence from the MHIC to the Respondent, August 29, 2022
- Correspondence from the MHIC to the Claimants, June 7, 2022
- Order from the MHIC to the Respondent, May 18, 2022
- MHIC Home Improvement Claim Form, signed July 14, 2022
- MHIC Complaint Form, undated
- Order from the MHIC to the Respondent, May 18, 2022 (duplicate)
- Correspondence from the MHIC to the Claimants, June 7, 2022 (duplicate)
- Receipt from the Respondent to the Claimants, undated
- Proposal from the Respondent to the Claimants, May 6, 2015
- Contract between the Respondent and the Claimants, June 22, 2015
- Materials order sheet, August 5, 2015
- Copy of deposited check from the Claimants to the Respondent, September 9, 2015
- Copy of cashier's check from the Claimants to the Respondent, September 2, 2015
- Energy assessment from Power Electric, July 11, 2022

Clmt. Ex. 3-1⁶ - Photograph depicting main floor window from interior, undated

Clmt. Ex. 3-2 - Photograph depicting closeup view of window glass from interior, undated

Clmt. Ex. 3-3 - Photographs depicting bedroom window from interior, undated

Clmt. Ex. 3-4 - Photograph depicting second bedroom window from interior, undated

⁶ At the conclusion of the hearing, I held the record open to allow the Claimants an opportunity to supplement the record with color copies of the photographs comprising Claimants' Exhibits 3-1 through 3-16. The Claimants did so on July 31, 2023. The color copies replace the black and white copies; both copies remain with the file.

- Clmt. Ex. 3-5 - Photograph depicting living room window frame from interior, undated
- Clmt. Ex. 3-6 - Photograph depicting living room windowsill from interior, undated
- Clmt. Ex. 3-7 - Photograph depicting living room window from interior, undated
- Clmt. Ex. 3-8 - Photograph depicting window from exterior, undated
- Clmt. Ex. 3-9 - Photograph depicting closeup view of windowsill from exterior, undated
- Clmt. Ex. 3-10 - Photograph depicting second closeup view of windowsill from exterior, undated
- Clmt. Ex. 3-11 - Photograph depicting windowsill from exterior, undated
- Clmt. Ex. 3-12 - Photograph depicting dining room window from interior, undated
- Clmt. Ex. 3-13 - Photograph depicting closeup view of windowsill and frame from exterior, undated
- Clmt. Ex. 3-14 - Photograph depicting top windowpane from interior, undated
- Clmt. Ex. 3-15 - Photograph depicting knife in window frame from interior, undated
- Clmt. Ex. 3-16 - Photograph depicting windowsill and frame from exterior, undated
- Clmt. Ex. 4 - Claimants' Baltimore Gas & Electric (BGE) bill, undated, with the following attachments:
- Claimants' BGE bill, February 15, 2022
 - Claimants' BGE bill, January 14, 2022
 - Claimants' BGE bill, January 18, 2023
 - Claimants' BGE payment history from January 15, 2018 through July 10, 2023
- Clmt. Ex. 5 - Estimate from Power Windows, July 11, 2022

I admitted the following exhibits offered by the Respondent:

- Resp. Ex. 1 - Order acknowledgment, July 8, 2015
- Resp. Ex. 2 - Handwritten notes with measurements, undated

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Remote Hearing, May 19, 2023

Fund Ex. 2 - MHIC Hearing Order, April 10, 2023.

Fund Ex. 3 - MHIC Home Improvement Claim Form, received August 24, 2022

Fund Ex. 4 - Respondent's licensing history, printed June 26, 2023

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and was accepted as an expert in window manufacturing and installation. The Respondent also presented the testimony of Joshua Dunevant, sales manager with American Home Contractors, LLC.

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 subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-31337-03.
2. On June 22, 2015, the Claimants and the Respondent entered into a contract for the Respondent to perform the following work at the Claimants' home: remove existing windows and install twenty-two triple-pane Vista premium vinyl windows; remove an existing sliding glass door and install one Vista premium sliding glass door; remove existing aluminum siding and install premium vinyl siding (Contract). The Contract included a lifetime labor warranty. The windows included a manufacturer's warranty through Vista.

3. The original agreed-upon Contract price was \$28,999.00.
4. On September 2, 2015, the Claimants paid the Respondent a deposit in the amount of \$5,000.00. On September 9, 2015, the Claimants paid the Respondent \$24,899.00. In total, the Claimants paid the Respondent \$29,899.00.⁷
5. The Respondent began work in September 2015 and completed the work in December 2015.
6. In December 2015, one week after the Respondent completed installation of the new windows, the Claimant began feeling air coming through the windows. The Claimant notified the Respondent, who returned to re-caulk all the windows.
7. In 2016, the Claimant continued to notice that air was coming into the home from the windows. The Claimant notified the Respondent, who again returned to re-caulk all the windows in December 2016.
8. In 2017, the Claimant continued to notice that air was coming into the home from the windows. The Claimant notified the Respondent. The Respondent did not return to the Claimants' home or otherwise address the Claimant's concern.
9. In December 2018, Vista went out of business and no longer honors its manufacturer's warranty.
10. In September 2020, approximately five years after installation, the Claimant began to notice moisture and fungus collecting in the glass of nine windows as well as cracks in the exterior vinyl window frames. Due to the COVID-19 pandemic, the Claimant waited until May 2021 to notify the Respondent regarding moisture in the windows.

⁷ No explanation was offered for why the total paid to the Respondent exceeded the Contract price.

11. The Vista windows installed at the Claimants' home are defective. Specifically, the window seals in at least nine windows have failed, allowing moisture to collect between the panes of glass.

12. The Respondent offered and continues to offer labor to replace the failed window glass at no cost to the Claimants if they agree to purchase the materials, estimated to be \$100.00 per window. The Claimants have declined this offer.

DISCUSSION

Applicable Law

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.

Burden of Proof

The Claimants have the burden of proving the validity of the Claim by a preponderance of the evidence. *Id.* § 8-407(e)(1); 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).

Parties' Positions

The Claimants argued that the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement by failing to properly install replacement vinyl windows in the Claimants' home. To support their Claim, the Claimants pointed to draftiness and air coming into the home through the windows as well as moisture collecting in the window glass. The Claimants also explained their frustration in having financially invested in a failed product.

The Respondent acknowledged that the seals of the windows installed in the Claimants' home have now failed and that they are a defective product. However, the Respondent argued that the window seal failure did not result from any unworkmanlike, inadequate, or incomplete home improvement on his part. The Respondent maintained that the responsibility to remedy the defective product falls upon the manufacturer, who is now out of business and can no longer honor its warranty. As a compromise and to remedy the defect, the Respondent explained that he offered, and continues to offer, the Claimants complimentary labor if they provided the materials to repair the window glass, but that they declined.

The Fund argued that the Claim was filed well after three years from when the Claimants discovered the loss or damage and that the Claim is therefore time barred. Alternatively, the Fund argued, if the Claim is not time barred, the Claimants failed to meet their burden to demonstrate that the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement when the Respondent installed the windows in their home. Also, the Fund argued that the window seal failure did not result from an act or omission by the Respondent. The Fund further suggested that the Claimants rejected the Respondent's good faith efforts by declining to accept the free labor to replace the window glass.

Analysis

For the reasons that follow, I conclude that the Claimants have not proven eligibility for compensation.

Statutory Bars to Recovery

By statute, certain claimants are excluded from recovering from the Fund altogether. First, I must consider whether there are any statutory impediments to the Claimants' recovery. There is no pending court claim for the same loss and the Claimants did not recover the alleged losses from any other source. Bus. Reg § 8-408(b)(1) (2015 & Supp. 2022). The Claimants reside in the home that is the subject of the claim and do 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 Claimants are not relatives, employees, officers, or partners of the Respondent, and are not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2022).

One threshold question remains regarding whether the Claim was timely filed. Section 8-405 of the Business Regulation Article requires, in relevant part, that “[a] claim . . . 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.* § 8-405(g) (2015 & Supp. 2022) (emphasis added).

The Claimants' concerns regarding the windows generally fall into two categories: the first is with respect to a long-standing complaint regarding draftiness and air coming into the home, and the second is with respect to a more recent concern regarding moisture collecting in the window glass.

With respect to the first complaint regarding draftiness and air, the evidence demonstrates that as early as December 2015, just one week after installation was completed, the Claimant began feeling air coming through the windows. She notified the Respondent, who returned to re-caulk all the windows. The following year in 2016, the Claimant continued to notice that air was coming into the home from the windows. The Claimant again notified the Respondent, who returned to re-caulk all the windows in December 2016. In 2017, the Claimant continued to notice that air was coming into the home from the windows. The Claimant notified the Respondent, who did not return to the Claimants' home or otherwise address the Claimant's concern. However, the Claimants did not file this instant Claim until August 24, 2022, more than six and a half years after the Claimants discovered the loss or damage in December 2015. Therefore, based on the requirement that a claim be brought against the Fund within three years, insofar as the Claim is premised upon the Claimants' long-standing complaint regarding draftiness and air coming into the home, it is not timely filed. *Id.* § 8-405(g) (2015 & Supp. 2022).

However, the Claim encompasses a second more recent concern regarding moisture collecting in the window glass. The evidence demonstrates that it was not until September 2020, approximately five years after installation, that the Claimant began to notice moisture and fungus collecting in the window glass. This Claim was filed approximately two years later on August 24, 2022. Accordingly, the Claim with respect to the Claimants' second complaint regarding moisture collecting in the window glass is timely filed and I proceed to consider whether the Claimants have proven eligibility for compensation on this basis.

Defective Window Seals

Briefly, the purpose of claims to the MHIC is to reimburse consumers for unworkmanlike, inadequate, or incomplete home improvements by home improvement contractors, including employees and subcontractors. The Fund administered by the MHIC is not one of general recourse for any loss a consumer may have sustained through the course of a home improvement by another actor, for example, a manufacturer, as presented in this case.

Id. § 8-405(a), (b) (2015 & Supp. 2022).

Here, the parties do not dispute that the Vista windows the Respondent installed at the Claimants' home were ultimately defective; however, the parties disagree as to who should bear the burden of that defect given the manufacturer is no longer in business. Though the windows were not defective at the time of installation, the Respondent testified that the window seals have since failed, allowing moisture to collect between the panes of glass. The Respondent estimated the national seal fail rate for vinyl windows to be approximately one to two percent, with Vista windows having a slightly higher fail rate at three percent. The Respondent explained that it can take months to years for a seal to fail. As in this case, it was approximately five years after installation when the Claimant began to notice the moisture collecting in the window glass.

Notwithstanding that the seals on the windows installed at the Claimants' home ultimately failed, this record does not support a finding that the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement. The Claimants offered no evidence to suggest that the seal failure resulted from an act or omission by the Respondent during installation. Mr. Dunevant testified that seal failure is generally a product defect that can be repaired by replacing the window glass but that it does not occur from installation.

The Respondent also testified that vinyl replacement windows like those installed at the Claimants' home are assembled by the manufacturer and shrink wrapped onsite before they are shipped for installation. The Claimant acknowledged that it took approximately five years before she noticed moisture beginning to collect in the window glass, again suggesting that the product was defective, not that the Respondent's installation of those windows in 2015 was unworkmanlike, inadequate, or incomplete.

Even if this record could support a finding that the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement, the Claimants unreasonably rejected good faith efforts by the Respondent to resolve the Claim. *Id.* § 8-405(d) (Supp. 2022). The Respondent offered and continues to offer labor to replace the failed window glass at no cost to the Claimants if they agree to purchase the materials. The Respondent estimated the materials to be \$100.00 per window and the Claimant indicated that at least nine windows have failed seals. The product itself came with a manufacturer's warranty, which had Vista remained in business, would have covered replacement of the windows. Under these circumstances, the Respondent's initial and continued offers to provide complimentary labor constitute good faith efforts to resolve the Claim. However, the Claimants have declined the offers, which would require paying approximately \$900.00 in materials. Considering the inability of the Claimants to seek recourse against Vista and the Respondent's continued willingness to address the Claimants' concerns, I find the Claimants' rejection of the Respondent's offers to resolve the Claim unreasonable.

Although I am sympathetic to the Claimants' position and recognize it is unfortunate that Vista is no longer in business to honor its manufacturer's warranty, for the reasons stated above, I conclude that the Claimants are not eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants have 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). Accordingly, I cannot recommend an award in this case.

RECOMMENDED ORDER

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

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

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

October 10, 2023
Date Decision Issued

Dania Ayoubi
Dania Ayoubi
Administrative Law Judge

DLA/ckc
#207401

PROPOSED ORDER

WHEREFORE, this 9th day of November, 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.

Joseph Tunney

Joseph Tunney

Chairman

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**