

The Maryland Home  
 Improvement Commission

v. Paul Brezinski  
 t/a G.S.I. Inc.  
       (Contractor)  
 and the Claim of  
 William Rosenberger  
       (Claimant)

\* BEFORE THE  
 \* MARYLAND HOME IMPROVEMENT  
 \* COMMISSION  
 \*  
 \* MHIC No.: 08 (90) 1603  
 \*  
 \*

\*\*\*\*\*

**FINAL ORDER**

WHEREFORE, this May 26, 2010, Panel B of the Maryland Home Improvement  
 Commission **ORDERS** that:

1. The Findings of Fact set forth in the Proposed Order dated March 24, 2010 are **AFFIRMED**.
2. The Conclusions of Law set forth in the Proposed Order dated March 24, 2010 are **AFFIRMED**.
3. The Proposed Order dated March 24, 2010 is **AFFIRMED**.
4. This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.

*Andrew Snyder*  
 Andrew Snyder, Chairperson  
 PANEL B

**MARYLAND HOME IMPROVEMENT COMMISSION**

PHONE: 410.230.6309 • FAX: 410.962.8482 • TTY USERS, CALL VIA THE MARYLAND RELAY SERVICE  
 INTERNET: WWW.DLLR.STATE.MD.US • E-MAIL: MHIC@DLLR.STATE.MD.US

IN THE MATTER OF THE CLAIM OF  
WILLIAM ROSENBERGER,  
CLAIMANT  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF PAUL BREZINSKI, T/A  
G.S.I., INC.

\* BEFORE M. TERESA GARLAND,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH NO.: DLR-HIC-02-09-09665  
\* MHIC NO.: 08 (90) 1603  
\*

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**RECOMMENDED DECISION**

STATEMENT OF THE CASE  
ISSUE  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On June 5, 2008, William Rosenberger (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$14,250.00 for actual losses allegedly suffered as a result of a home improvement contract with Paul Brezinski, t/a G.S.I., Inc., (Respondent).

I held a hearing on December 16, 2009 at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (Supp. 2009). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. James McAvoy, Esquire, represented the Claimant, who was present. Arthur Renkwitz, Esquire, represented the Respondent, who was present.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 28.02.01.

### **ISSUE**

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

### **SUMMARY OF THE EVIDENCE**

#### Exhibits

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

- Cl. Ex. 1 - Proposal, dated July 27, 2005
- Cl. Ex. 2 - Invoice reflecting payments made between July 30, 2005 and June 13, 2006, dated July 31, 2005
- Cl. Ex. 3 - "Guarantee," dated February 11, 2006
- Cl. Ex. 4 through 10 - various photographs of the Claimant's chimney
- Cl. Ex. 5(a)<sup>1</sup> - Proposal of Liberty Site Services, Inc., dated January 19, 2008
- Cl. Ex. 11 - "Troubleshooting Guide to Residential Construction" (2005), p. 91

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

- GF Ex. 1 - Notice of Hearing with attached Hearing Order, dated August 13, 2009
- GF Ex. 2 - Memorandum from Sandra Sykes to Legal Services, dated November 9, 2009; Notice of Hearing, dated September 29, 2009, with attachments; Hearing Order, dated March 16, 2009; Envelope with certified mail information
- GF Ex. 3 - Licensing Information, dated December 15, 2009

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<sup>1</sup> During the hearing, I inadvertently numbered two exhibits "5." When the error became apparent, the hearing had concluded. Consequently, I re-numbered the document now known as "5(a)."

GF Ex. 4 - Letter from John Borz to the Respondent, dated June 23, 2008, with attached Claim Form, received June 5, 2008

The Respondent did not offer any exhibits.

Testimony

The Claimant testified and presented the testimony of John Heyn, who was accepted as an expert in the fields of home inspection, estimation and construction.

The Respondent testified on his own behalf.

The Fund did not present any witnesses.

**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 88790.
2. On July 30, 2005, the Claimant and the Respondent entered into a contract<sup>2</sup> to remove the Claimant's existing chimney and firebox to the ground, dig the existing footer down to at least thirty-six inches below grade, install rebar, pour a concrete foundation for a new chimney to match the previous chimney in height, width and depth, and build a new brick masonry chimney to replace the previous one. The Claimant was responsible for removing debris from the worksite and the Respondent was responsible for providing all necessary material. The contract did not specify when the work would begin or when it would be completed.
3. The original agreed upon contract price was \$8,200.00.

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<sup>2</sup> The document was titled "Proposal." The bottom of the document had an area titled "Acceptance of Proposal." which was signed and dated by the Claimant.

4. On July 31, 2005, the Claimant paid the Respondent \$1,500.00. The Claimant made subsequent payments on February 4, 2006 of \$1,500.00, February 11, 2006 of \$3,200.00 and a final payment on June 13, 2006 of \$2,000.00.
5. The Respondent fulfilled the terms of the contract in a timely and workmanlike manner.
6. The Claimant sustained no actual loss.

### DISCUSSION

Section 8-405 of the Business Regulation article provides that 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) (Supp. 2009). Section 8-401 defines "actual loss" as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2004).

COMAR 09.08.03.03B governs the calculation of awards from the Fund:

**B. Measure of Awards from Guaranty Fund.**

(1) The Commission may not award from the Fund any amount for:

- (a) Consequential or punitive damages;
- (b) Personal injury;
- (c) Attorney's fees;
- (d) Court costs; or
- (e) Interest.

(2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) 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, 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 measurements accordingly.

In this case, the Claimant solicited the Respondent to remove his existing chimney, which had separated from the house, dig a more substantial thirty-six inch foundation for a new chimney supported by rebar and concrete, and construct a new chimney the same height, width and depth as the Claimant's previous chimney. In his testimony, the Claimant said that he moved into his house in 1979 or 1980 and he began experiencing problems with his then-existing chimney around 1984 or 1985. The chimney was pulling away from the house and he could see the wall of the house behind the chimney. In 2005, the Claimant became concerned that the chimney would collapse onto his neighbor's property and he found the Respondent's business information at a local fireplace shop. The Claimant testified that he believed the cause of the leaning chimney was an inadequately deep foundation for the chimney. Consequently, his contract with the Respondent specifically required a thirty-six inch deep foundation for the new chimney. The Claimant said that he became concerned during the Respondent's work that the Respondent had not dug a thirty-six inch foundation and, thus, had the Respondent sign a guaranty of his work on February 11, 2006. (Cl. Ex. 3) The Claimant testified that he knew the foundation had not been dug any deeper because there was no dirt for him to haul away from the job site. Approximately one year after the conclusion of the Respondent's work, the Claimant noticed that the caulking around the channel of the chimney was pulling away from the channel.

When he called the Respondent regarding the issue, the Respondent came to the Claimant's home, used a level on the Claimant's house and concluded that the Claimant's house had shifted away from the chimney.

The Claimant testified that he had had no problems with his house, other than the doorframe in the basement sagging. He added that he is having all of the doors in the house replaced and he does not know whether the door frames are defective or the house has settled. The Claimant further noted that his house is built over a spring, thus the name of the area where he lives is called "White Marsh/Silver Spring."

John Heyn, who was admitted as an expert in the fields of home inspection, estimation, and construction, testified on the Claimant's behalf. He said that he inspected the Claimant's home in November 2007 and did not find any evidence of settlement or structural problems with the house. He said that, based on his visual inspection, the attic was structurally sound and intact. However, he noted a number of deficiencies with the chimney. He said that the chimney was pulling away from the house and that the chimney flashing was defective and it was poorly patched and not in accordance with standards. (Cl. Ex. 4 through 10) It was his opinion that the chimney was not installed in a workmanlike manner and should have had a footer, especially since the original chimney failed because of footing issues. He added that the roofing job around the chimney was not adequate.

On cross examination, Mr. Heyn testified he did not take measurements while inspecting the attic, but instead looked at the framing to see if it was tight. He did not see any shifting of the joints or the rafters. He stated that he could not see how the chimney would lean if it had a good footing. However, he elaborated he did not use a plumb-line on the chimney to determine if it was the structure that was leaning or the house that was shifting. Further, Mr. Heyn testified that the need to replace doors in the house could indicate settlement to the house. The weight of the

building components in the house can cause the doors to bind or shift. Humidity can also result in doors that no longer fit. Finally, Mr. Heyn testified that he did not know who was responsible for patching areas of the roof surrounding the chimney.

The Respondent testified that when he began his work for the Respondent, he put a level on the original chimney, which indicated the chimney was leaning away from the house. He did not, at that time, use a level on the house. He added that, pursuant to the contract, he dug a thirty-six inch below grade foundation for the new chimney down to the level of the original foundation for the house. He further excavated the foundation six inches wider on each of the four sides, installed rebar and poured concrete in the foundation. The Respondent stated that the Claimant did not haul away any of the excavated dirt because it was the Respondent's responsibility to haul away anything that was not debris. The dirt was not debris.

The Respondent addressed the issue of the unworkmanlike roof flashing and patching. He denied that he performed any patching of the areas in question and when he reviewed Cl. Ex. 9, he said "the metal [flashing] is mine, the goop is not." Finally, the Respondent explained that when the Claimant called him one and one-half years after his work was completed, he went to the Claimant's house, inspected the chimney and, using a level, found that the gable (where the siding abuts the chimney) was leaning opposite the chimney "2 inches over a foot."

The Claimant argues that the Respondent did not dig a thirty-six inch footer as agreed upon in the contract and, as a result, his chimney has shifted away from his house. The problem with the Claimant's contention is that he presented no evidence to that effect. First, the evidence is not clear that the Respondent failed to dig the footer as in the contract. Mr. Heyn never testified that he verified that the contracted-for foundation was not dug. Second, clearly either the house or the chimney (or both) has shifted, causing a separation of the two structures. However, the Respondent was the only witness who presented evidence, in the form of testimony, that it



was the house that shifted. The Claimant had ample opportunity to have had someone use a level or a plumb-line on the chimney and the house to determine the cause of the separation of the two. That did not occur. Without that evidence, I am hard-pressed to find in favor of the Claimant.

After considering the evidence presented by the Claimant, I have determined that he has failed to demonstrate that he is entitled to any reimbursement from the Fund.

**CONCLUSIONS OF LAW**

I conclude that the Claimant has not proven that he sustained an actual loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004).


**RECOMMENDED ORDER**

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

**ORDER** that the Claimant's claim against the Maryland Home Improvement Guaranty Fund be **DISMISSED**; and

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

February 9, 2010  
Date Decision Issued

  
M. Teresa Garland  
Administrative Law Judge

MTG:fe  
#111374

<p>IN THE MATTER OF THE CLAIM OF WILLIAM ROSENBERGER, CLAIMANT AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ALLEGED ACTS OR OMISSIONS OF PAUL BREZINSKI, T/A G.S.I., INC.</p>	<p>* BEFORE M. TERESA GARLAND, * AN ADMINISTRATIVE LAW JUDGE * OF THE MARYLAND OFFICE * OF ADMINISTRATIVE HEARINGS * OAH NO.: DLR-HIC-02-09-09665 * MHIC NO.: 08 (90) 1603 *</p>
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**FILE EXHIBIT LIST**

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The Respondent did not offer any exhibits.

PROPOSED ORDER

*WHEREFORE, this 24th day of March 2010, 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.*

*Rossana Marsh*

*Rossana Marsh  
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION