

**IN THE MATTER OF THE CLAIM  
OF REGINA EKONG,  
CLAIMANT  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF FITZGERALD  
GILMORE,  
T/A SCULPURE TECH CORP.,  
RESPONDENT**

**\* BEFORE STUART G. BRESLOW,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\*  
\*  
\*  
\* OAH No.: DLR-HIC-02-19-00463  
\* MHIC No.: 17 (05) 1169  
\***

\* \* \* \* \*

**PROPOSED DECISION**

**STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSION OF LAW  
RECOMMENDED ORDER**

**STATEMENT OF THE CASE**

On February 9, 2018, Regina Ekong (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$32,945.00 in actual losses allegedly suffered as a result of a home improvement contract with Fitzgerald Gilmore, trading as Sculpture Tech Corp: (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On December 21, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on April 1, 2019 at 1400 McCormick Drive, Largo, Maryland. Bus. Reg. § 8-407(e). Nicolas Sokolow, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. N. David Etokebe, Esquire, represented the Claimant, who was present. 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 (2014 & Supp. 2018); Code of Maryland Regulations (COMAR) 09.01.03; 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. 1 Proposal/Contract between Claimant and Respondent, dated September 17, 2016
- Clmt. Ex. 2 Letter from N. David Etokebe, Esq. to Kevin Niebuhr, Investigator, MHIC with attached claim form, dated February 19, 2018; letter from Kevin Niebuhr to Claimant, dated June 29, 2017; Order from MHIC to Respondent, dated May 15, 2017; Complaint Form from Claimant, dated April 5, 2017; Letter from Claimant to MHIC, dated April 2, 2017; proposal contract between Claimant and Respondent, dated September 17, 2016; check numbers and amounts paid to Respondent by Claimant totaling \$14,000.00; Prince George's County Permit, issued October 11, 2016; Permits and Licenses Application Tracking System, dated November 29, 2016; Correction Order, dated January 10, 2017; email from Juan Carlos Serrano R.A., JCS Architects LLC to Claimant, dated June 12, 2017; Invoice /payment schedule from Deck Helmet, dated February 26, 2018
- Clmt. Ex. 3 Building Permit, issued October 11, 2016
- Clmt. Ex. 4 Correction Order, issued January 10, 2017

- Clmt. Ex. 5 Photograph of work being performed by Respondent, undated
- Clmt. Ex. 6 Email from Claimant to N. David Etokebe, Esq., dated May 25, 2017
- Clmt. Ex. 7 Three photographs of work in progress by Respondent and Correction Order, dated January 10, 2017
- Clmt. Ex. 8 Building permits to construct the deck with new contractor, Deck Helmet Inc.
- Clmt. Ex. 9 Payment history for Deck Helmet in the total amount of \$36,945.00, issued February 26, 2018
- Clmt. Ex. 10 Email from Claimant to N. David Etokebe, Esq., dated June 15, 2017
- Clmt. Ex. 11 Thirteen photographs of the deck built by Respondent
- Clmt. Ex. 12 Four photographs of deck built by Deck Helmet

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

- Resp. Ex. 1 Response from Respondent to Complaint filed by Claimant, undated
- Resp. Ex. 2 Email from Claimant to Respondent and response form from Respondent, dated May 25, 2017
- Resp. Ex. 3 Invoice from Roy Adams, dated September 20, 2016

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 Hearing Order, dated December 21, 2018
- Fund Ex. 2 Notice of Hearing dated January 30, 2019
- Fund Ex. 3 Licensing History of Respondent, printed March 29, 2019
- Fund Ex. 4 Letter from Joseph Tunney, Chairman, MHIC, to Respondent with a copy of Claimant's Home Improvement Claim Form, dated June 18, 2018
- Fund Ex. 5 Correction Order, November 1, 2016
- Fund Ex. 6 Approval of Footing Inspection, dated November 7, 2016

Testimony

The Claimant testified on her own behalf.

The Respondent testified on his behalf.

The Fund presented the testimony of the Claimant.

**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 5266082.
2. On September 17, 2016, the Claimant and the Respondent entered into a contract (Contract) to construct a deck with a composite surface and vinyl railings along with a handicap ramp constructed of pressure treated wood and a patio (Project). The Contract stated that work would begin within three to four days following acceptance of the Contract and would be completed within two to three weeks from that date.
3. The original agreed-upon Contract price was twenty-eight thousand dollars.
4. The Claimant paid a total of twenty-four thousand dollars to the Respondent. The remaining four thousand dollars was to be paid upon completion of the Project, including the completion of the patio.
5. Work on the Project began slowly due to inclement weather that restricted the Respondent's ability to pour the footers for the deck. The Respondent wanted to expedite the construction of the Project due to colder temperatures in the fall that would limit his ability to finish the Project before the cold winter temperatures set in.
6. Changes were requested by the Claimant resulting in new drawings that were needed in order to obtain a permit for the Project. Although the cost for pulling permits for the Project was included in the Contract price, the architectural drawings were not.

7. The Respondent contacted an architect who was a friend of the Respondent's partner, Mr. Brown, who offered a discount for preparing the drawings. The cost for the drawings was \$600.00. The Claimant insisted on paying the architect directly for the drawings, but to date, she has not paid the architect for these drawings.

8. Once the permits were issued, inspectors from the Prince George's County Department of Permitting, Inspections and Enforcement, came to the Project site to inspect the Project. Several times, correction orders were issued, including corrections involved in framing and adding additional footers, along with structural beams for support.

9. Pouring the footers was delayed because the Claimant had an in-ground sprinkler system installed in the yard where the deck was to be installed. Instead of using a machine to dig the footers that would have taken only one day, the Respondent had to install the footers manually, causing further delay in the Project.

10. A meeting was requested by the Claimant to address the ongoing issues, including her belief that the Project was not being performed satisfactorily. The Project was delayed well beyond what either party anticipated. The meeting was to be held at the Claimant's residence with just her and the Respondent in attendance. On January 1, 2017, the meeting was held. However, there were family members of the Claimant present at the table and the Respondent wanted Mr. Brown to be in attendance as well, since she had other participants at the meeting. The Respondent interrupted the meeting and drove to pick up Mr. Brown. With Mr. Brown in attendance, a family member of the Claimant took Mr. Brown aside and offered to have the Claimant pay him directly if he were to take over the construction of the Project. Mr. Brown informed the Respondent of this offer which upset the Respondent. After further heated discussions, the Claimant told the Respondent and Mr. Brown to leave her house.

11. After a week passed since he was told to leave, the Respondent called the Claimant and tried to talk to her, but he was told not to call her again.

12. The Respondent contacted the Claimant by email on May 22, 2017 in an effort to meet with her so that he could finish the Project. On May 25, 2017 she rejected his offer.

13. On March 6, 2017, new permits were pulled in the name of Deck Helmet, Inc. for the construction of a ramp, deck and patio at the Claimant's home. The total cost for the work performed by Deck Helmet, Inc. was \$36,945.00. The work was completed in July 2017. Deck Helmet, Inc. did not tear down the entire work performed on the Project by the Respondent.

14. The value of the work performed by the Respondent is unknown.

15. The Prince George's County Department of Permitting, Inspections and Enforcement did not order the Respondent to tear down the work he performed on the Project.

### DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.”

*Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

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) (2015)<sup>1</sup>; see also COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). “[A]ctual loss’ means the costs of restoration, repair, replacement, or

---

<sup>1</sup> Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

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 Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Claimant learned of the Respondent through an advertisement. After discussing the parameters of what the Claimant wanted for the Project, the Respondent prepared the Proposal/Contract for the Claimant’s approval. Although the Claimant testified that she anticipated that the handicap ramp would include a composite surface rather than pressure treated wood, the Contract clearly shows what the materials will be for this portion of the Project, pressure treated wood.

The Claimant argued that the Respondent “lied” concerning who was obligated to pay for the cost of permits. The Contract clearly states that the cost of pulling the permits for the Project was the Respondent’s responsibility. However, when changes were made requiring modification to the permits, the Respondent asked the Claimant to be compensated for this expense. The permits were a result of a change in the Project that required a change to the permits. Changes result in additional cost to the Claimant, although the changes should have been in written form. Nevertheless, the Claimant’s characterization that the Respondent lied is simply not supported by the evidence.

The Claimant testified that according to the Prince George’s County inspectors, the entire Project constructed by the Respondent had to be taken down and started over. The evidence does not support her allegation. First, although there are several correction orders issued by the Prince George’s County inspectors, none of them required that the work performed by the Respondent be torn down. The Correction Order issued on January 10, 2017 (Clmt. #7) suggests that a new contractor was either hired or was about to be hired by the Claimant. The corrective

items contained in the Correction Order address having the drawings revised to show as built drawings, detail to use composite decking, permit to reflect new contractor and to have the new contractor meet with the inspector before commencing work. The Claimant introduced no evidence, other than her own testimony, that the work performed by the Respondent must be torn down and discarded.

The evidence the Claimant did introduce during the hearing seems to strongly suggest that the work performed by the Respondent was used by the new contractor, Deck Helmet, Inc. In her letter to the MHIC, dated April 2, 2017, she stated that the new contractor and the State inspectors have all agreed that 70% of the old structure has to be taken down. (Clmt. #2, Bates Stamp P004). The Claimant did not offer any value for the work performed by the Respondent, although she claims that 30% of the work performed by the Respondent was able to be used by the new contractor. The Claimant testified that all of the work done previously by the Respondent was discarded. Both statements cannot be true. I give more weight to her statement given to the MHIC which was given closer in time to the subject event rather than her testimony at the hearing, where she may have been motivated to obtain the most she can recover to offset what she has paid to both the Respondent and Deck Helmet, Inc.

It was obvious from the Claimant's facial expressions during the hearing that she disagrees with the Respondent's claim that he exercised good faith efforts to complete the Project to her satisfaction. It was apparent from the outset that the Claimant had an issue as soon as the Contract was signed, believing that the handicap ramp would be constructed of composite material rather than pressure treated wood, yet she signed the Contract and agreed to have the decking made of pressure treated wood. She claimed that the corrective orders were a result of safety issues with the deck that required it to be torn down, yet none of the corrective orders indicate that the deck was unsafe or that it had to be torn down. The Claimant was rightfully



frustrated that the Project took so long, since it was anticipated that the work would be done within a couple of weeks. The rainy weather and colder temperature contributed to the delays, along with having to wait for inspections and corrective orders to be completed. Most, if not all of the delays, were not within the Respondent's control, and he tried to keep the Claimant informed at all phases of the Project.

Photographs of the work performed by the Respondent (Clmt. #7) depict the deck nearly complete, but without the composite flooring. The Respondent testified credibly that when he was taken off the job by the Claimant, the composite decking had been delivered to the Project site. He also stated that he never retrieved his tools from the jobsite after he was removed from the site.

I find that the Respondent did not abandon the Project. He was told not to return after the meeting on January 1, 2017. When he called a week later in an effort to settle their dispute and resurrect the Project, the Claimant told him not to call again. He wrote to her on May 22, 2017 suggesting that they put the fighting aside and work out their differences so that he can complete the Project. She responded three days later rebuffing his suggestion. (Resp. #2).

I find that the Respondent used good faith efforts to try and finish the Project. Although the Claimant had already contracted with Deck Helmet, Inc. by the time the Respondent sent his May 22, 2017 email, the Claimant did not tell him that in her response of May 25, 2017. Maryland law provides that a claim against the Fund may be denied if the claimant has "unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann. Bus. Reg. § 8-405(d). The Respondent was fully prepared to perform the Project, yet the Claimant did not give him an opportunity to complete the Project following the January 1, 2017 meeting, the subsequent telephone call a week later and his email of May 22, 2017.

Finally, I do not find that the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement. Md. Code Ann., Bus. Reg. § 8-401. The Respondent did have several correction orders issued on the Project, but there was no evidence to indicate that the corrective orders were either ignored or were not complied with. The Project was not completed and there was work to be performed that was not allowed to be performed because the Claimant refused to let the Respondent finish the Project.

Accordingly, I thus find that the Claimant is not eligible for compensation from the Fund.

**PROPOSED CONCLUSION 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).

**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.

**Signature on File**

June 5, 2019  
Date Decision Issued

\_\_\_\_\_  
Stuart G. Breslow  
Administrative Law Judge

SGB/cj  
#179055

**PROPOSED ORDER**

***WHEREFORE, this 24<sup>th</sup> day of July, 2019, 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.***

***W. Bruce Quackenbush***

***W. Bruce Quackenbush  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**