IN THE MATTER OF THE CLAIM	*	**BEFORE JEFFREY T. BROWN,**
OF DENNIS ANDREWS,	*	**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 DONNA GORJON,	*	**OAH No.: LABOR-HIC-02-22-14030**
T/A GREEN ANGELS	*	**MHIC No.: 21 (75) 1162**
LANDSCAPING, LLC,	*	
RESPONDENT	*	

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PROPOSED DECISION

STATEMENT OF THE CASE

On September 1, 2021, Dennis Andrews (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 $3,197.75 for actual losses allegedly suffered as a result of a home improvement contract with Donna Gorjon, trading as Green Angels Landscaping, LLC (Respondent). Md. Code Ann., Bus. Reg.

§§ 8-401 to 411 (2015 & Supp. 2022).[1] On June 8, 2022, the MHIC issued a Hearing Order on the Claim. On June 13, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On November 10, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20. Jessica Kaufman, Assistant Attorney General, Department, represented the Fund. The Claimant was 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 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 exhibit(s) offered by the Claimant:

Clmt. Ex. 1 - Contract between Green Angels Landscaping and Diane Andrews[2], October 11, 2020, with two digitally-enhanced photos of proposed plant placement; Invoice from Green Angels Landscaping to Andrews Equipment Company, Inc., November 9, 2020; Check from Andrews Equipment Company, Inc. to Green Angels Landscaping for $6,907.00, November 13, 2020; Map, undated

[1] Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.
[2] The Claimant's home is owned by the Claimant, Dennis Andrews, and his wife, Diane Andrews. The Complaint was filed by Mr. Andrews on their joint behalf.

Clmt. Ex. 2 - Photographs (7) depicting the exterior of the Claimant's home and grounds, undated[3]

Clmt. Ex. 3 - Photographs (7) depicting the Claimant's grounds, taken on or about November 15, 2020

Clmt. Ex. 4 - Photographs (7) depicting the Claimant's grounds, undated[4]

Clmt. Ex. 5 - Calderon Landscaping, Inc. Estimate, September 20, 2021

Clmt. Ex. 6 - Claimant's narrative of events, June 15, 2021[5]

I admitted the following exhibit offered by the Respondent:

Resp. Ex. 1 - Photograph of a holly tree, June 2021[6]

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, September 30, 2022; Notice of Hearing, June 29, 2022; Hearing Order, June 8, 2022

Fund Ex. 2 - Maryland Department of Labor, I.D. Registration, MHIC, September 13, 2022; Department of Licensing and Regulation Professional License History, September 13, 2022

Fund Ex. 3 - Letter from the MHIC to the Respondent, April 8, 2022, with attached Home Improvement Claim Form, August 27, 2021

Testimony

The Claimant testified and presented the testimony of co-owner and spouse, Diane Andrews.

The Respondent presented the testimony of Mario Gorjon, identified as co-owner of Green Angels Landscaping.

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[3] The Claimant testified initially that the photos were taken on or about November 15, 2020. However, upon subsequent questioning, the Claimant acknowledged that the stated date was inaccurate and he did not know the date they were actually taken. They appear to have been taken during Summer months.

[4] The Claimant testified that the photographs were taken on or about December 1, 2020. The first of seven photographs appears to have been taken in the late Fall based on the appearance of foliage. The remaining photographs appear to have been taken during Spring or Summer months, based on visible foliage.

[5] This Exhibit was originally labeled by the Claimant as Ex. AA. It has been renumbered as Clmt. Ex. 6 to avoid confusion.

[6] At the outset of the hearing, the Respondent pre-marked Exhibits 1, 2, 3, 4, 6, 8, 12, 13, 14, 15, and 16. Of these, the Respondent identified and moved into evidence only Exhibit 1. The Respondent was asked if she wished to offer any other exhibits, and she declined to offer any exhibits other than Resp. Ex. 1.

The Fund did not present the testimony of any witness.

PROPOSED FINDINGS OF FACT

I find the following proposed 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 5554875.[7]

2. On October 11, 2020, the Claimant and the Respondent entered into a contract to perform landscaping services, including planting approximately 188 plants. (Contract).

3. The original agreed-upon Contract price was $10,360.00. The Claimant paid a deposit of $3,453.00 on October 11, 2020.

4. The Contract included a line item for installation of eight American Holly trees, at a cost of $2,800.00. The cost of the remaining plants was $7,560.00.

5. On or about November 13, 2020, the contract was completed and the Claimant paid the remaining balance of $6,907.00.

6. The Contract includes a "Plant Warranty" for one year for plants that fail to survive despite proper care. The Contract does not specify any other warranties.

7. Between November 2020 and April 2021, the holly trees planted outside of the fenced portion of the Claimant's grounds suffered damage due to deer consuming leaves on the lower portion of those trees.

8. In or about April 2021, the Respondent sent Mario Gorjon to the Claimant's property to inspect the damaged holly trees. On two dates not specified in the record, Mr. Gorjon applied deer repellent to the Claimant's holly trees, and offered that the Respondent

[7] This was the Respondent's license number on October 11, 2020. On December 16, 2020, the Respondent's license was renewed with license number 5619777.

could provide that service to the Claimant for a charge, separate from the Contract. The Claimant declined.

9. None of the eight holly trees have died since they were planted.

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.

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 and 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).

Positions of the Parties:

The Claimant testified about the interactions between himself and his wife, Diane Andrews, and the Respondent that preceded the execution of the Contract. He stated that in the Summer of 2020, they decided to enhance their grounds with landscaping. This was their third landscaping project. The Claimant testified that in October 2020, he and Mrs. Andrews met at their home with Mario Gorjon, co-owner of Green Angels Landscaping. The Claimant said that he and his wife specifically informed Mr. Gorjon that they lived close to Patapsco State Park, where there were a significant number of deer that came into the Claimant's neighborhood and ate trees. The Claimant testified that because of this circumstance, he and his wife informed Mr. Gorjon that their priority was to have only deer-proof plants installed. He also said that he invited Mr. Gorjon to observe the plants on the property of some neighbors to note what plants had not been eaten by deer. At the end of that meeting, the Claimant and his wife were invited by Mr. Gorjon to visit the Respondent's design center, which is also the business location and home of the Respondent and Mr. Gorjon. The Claimant said that they did visit that location and emphasized again to Mr. Gorjon the necessity that he select only plants that deer would not eat.[8] He testified that Mr. Gorjon agreed to provide such plants.

The Claimant testified that despite Mr. Gorjon's alleged assurance that he would install deer-proof plants, rather than deer-resistant ones, the Respondent failed to do this, resulting in the installation of holly trees which have been partially eaten by deer. The Claimant testified about and presented photographs showing holly trees installed by the Respondent which were partially stripped of leaves by deer. The Claimant confirmed that the holly trees had not died, and that they eventually grew new leaves after each year's leaves were partially eaten.

[8] The parties agree that Mr. Gorjon was the Respondent's representative for purposes of the Contract and its completion. Mrs. Gorjon, the Respondent, only communicated with the Claimant or his wife by electronic mail or other messaging options.

The Claimant's wife, Mrs. Andrews, also testified and confirmed that all pre-contract discussions between the parties concerning deer-proof plants were had with Mr. Gorjon only. She testified that Mr. Gorjon did return to their property after installation to observe damage done by deer, and that Mr. Gorjon never spoke of the need to employ a deer-repellent treatment to the holly trees before they were installed. She stated that Mr. Gorjon did not offer treatment with deer-repellent until after he returned in the Spring of 2021 to inspect damage to the holly trees. Mrs. Andrews expressed her frustration that Mr. Gorjon did not accept responsibility on behalf of the Respondent for failing to install deer-proof trees and pointed out that the Contract does not include language providing there is no warranty against damage caused by deer.

The Respondent presented the testimony of Mr. Gorjon, who corroborated the Claimant's testimony about visiting the Claimant's home before preparing the Contract, having them visit the Respondent's business location to observe what had been planted there, and that the installation had proceeded well and to the Claimant's satisfaction.[9] Mr. Gorjon's testimony differed as to the discussions that preceded the preparation of the Contract and the installation. Mr. Gorjon agreed that the Claimant and Mrs. Andrews expressed a desire for deer-proof plants but denied that he promised to provide those because there are none. He explained that he showed the Claimant and Mrs. Andrews deer-resistant trees, including holly trees, and explained that they required treatment with deer repellent for better protection. Mr. Gorjon testified that he suggested all deer-resistant plants to them, and they requested installation of those plants. He testified that he discussed with the Claimant and Mrs. Andrews the need to treat all plants with deer repellent four times a year, and that Mrs. Andrews expressed familiarity with the use of

[9] The Respondent did not present evidence of the specific date of the Claimant's visit to the Respondent's business location prior to executing the Contract, but during cross-examination of Mrs. Andrews, the Respondent referred to an email written by her on June 15, 2020 which included reference to the visit, suggesting that the visit may have occurred prior to October 2020, as the Claimant had stated.

deer-repellent, but that they declined to add the service of applying deer repellent to the Contract before it was executed.

Mr. Gorjon testified that at the conclusion of planting the Contract items, he discussed with the Claimant and Mrs. Andrews the necessity of watering their plants, pruning them, mulching plant beds at least two times a year, applying fertilizer, and using deer repellent four times per year. Mr. Gorjon testified that he later visited the Claimant's home at least twice at their request to inspect the damage done by deer to the holly trees, including in April 2021, and applied deer repellent twice as a courtesy to them. However, he testified that they again declined to purchase a service plan for the application of deer repellent.

Analysis:

For the following reasons, I find that the Claimant has not proven eligibility for compensation on the basis of unworkmanlike, inadequate, or incomplete home improvements. The parties agreed that everything specified in the Contract was fulfilled in terms of installation and completion. The Claimant concurred that the work was performed very well and completely. As such, there is no evidence that the Respondent's performance was unworkmanlike or incomplete. Therefore, the Claimant must prove that the Respondent's home improvement was inadequate. In support of that contention, the Claimant argued that the Respondent failed to deliver what he contracted for, which is deer-proof trees, and that the Respondent failed to offer the application of deer repellent as a service under the Contract.[10]

Whenever parties to a contract dispute performance of the terms of that contract, it is necessary first to determine what terms the contract at issue provides as to the scope of work to be performed, and the alleged deficiency of the items or performance in dispute. Here, the

[10] The Claimant agreed that his proposed damages are related exclusively to the replacement of the eight American Holly trees, for which the Contract provided a cost of $2,800.00.

Claimant presents two arguments. The first is that he and Mrs. Andrews bargained for only deer-proof trees, that the Respondent agreed to provide deer-proof trees, and that the Respondent installed holly trees, which are not deer-proof. The second, based on the Claimant's closing argument, is that he was not offered a protection plan by the Respondent, consisting of the application of deer repellent, as a result of which he contends his holly trees were not protected against damage.

The Claimant agreed that his monetary claim of $3,197.75 is limited to replacement of the eight holly trees identified in the Contract.[11] The Contract price of the eight holly trees, each of seven-foot height, including installation was $2,800.00. The part of the Contract pertaining to the purchase and installation of the holly trees is found in Clmt. Ex. 1 at page 2, which provides:

> Rear Elevation
>
> - 8 American Holly
>
> Define tree bed, edge, mulch, fertilize, stake and wire all eight trees. 7'

At the conclusion of the Contract is a Plant Warranty (Warranty), which provides as follows:

> All plant material supplied and installed by the Green Angels Landscaping shall be guaranteed for a period of one year from the time of planting. Transplants are not warranted. Any plants that fail to survive will be replaced once, provided plants are watered, receive adequate care, and plants have not suffered mechanical damage or damaged by storm, fire, and the like.

Id.

The Contract further provides a "Note", stating:

> This proposal does not include additional work other than what has been described above; additional work should be submitted for a new proposal. Any alteration or deviations from the above specifications involving extra cost will become an additional charge over and above this proposal.

[11] The Claimant explained that he was seeking reimbursement of the $2,800.00 paid to the Respondent for eight holly trees plus $397.75 for labor to replace the trees and add fertilizer. The Claimant could not identify a source for the $397.75 labor cost he added to the $2,800.00 Contract price for the holly trees. The Claimant eventually introduced Clmt. Ex. 5, an estimate from Calderon Landscaping, Inc., but that estimate provided for installation of five Green Giant trees of ten-to-twelve-foot height, at a total cost of $1,975.00. As such, what was estimated to be replaced did not match the seven-foot-tall holly trees the Respondent had installed, in either kind or quantity.

Id.

The Contract contains no characterization or description of the eight holly trees, i.e. "deer-proof," and provides no other warranties. Review of the entire Contract reveals no additional agreements or terms concerning products or performance. That is, the Contract is silent on any alleged requirement by the Claimant that the Respondent provide only deer-proof trees, or any agreement by the Respondent to do so. The Claimant recalled that the Respondent's alleged assurance of deer-proof trees was provided at the time of his and Mrs. Andrews' visit to the Respondent's design center, which was prior to the execution of the Contract. Thus, if the proposed Contract had failed to include that alleged requirement when presented by the Respondent to the Claimant for signature, the Claimant could reasonably have required that the Contract be corrected before execution to ensure it contained the Respondent's agreement to provide only deer-proof trees. There is no evidence of such a demand or correction.

Similarly, the Respondent could reasonably expect that if the proposed Contract failed to include something the parties had agreed upon in advance as a term of the Contract, the error would be raised by the Claimant and the Contract would be revised to correct the error before it was signed. There is no evidence of such an exchange. The Note, recited above, foresees potential disagreements and precludes in advance any change in the scope of the Contract once it is in effect. Until it was signed, the parties remained free to adjust or negotiate any additional description of products or services before signing the Contract and agreeing that it contained the entire agreement of the parties.

On its face, the Contract is not ambiguous. It does not suggest any agreements or conditions other than those in the plain language of the Contract. The Contract makes no provision whatsoever for deer-proof trees. Indeed, despite the Claimant's claim that deer-proof trees were promised, the parties disagreed as to whether deer-proof trees actually exist. Mr.

Gorjon testified that there are none, since deer will eat whatever they wish, and the most a landscaper can provide are deer-resistant trees, which are what he stated the Respondent promised and delivered. Furthermore, Mr. Gorjon testified that even deer-resistant trees require treatment with deer repellent to remain resistant.

The Claimant asserted generally that there are deer-proof trees, and argued that the Respondent promised to provide them, but offered no evidence that trees and plants that deer will not eat actually do exist, what they are, or that these specific trees were ever discussed by the parties. Even in the estimate obtained by the Claimant to replace the eight holly trees under the Contract, Calderon Landscaping does not propose or promise that the five Green Giant trees intended to replace the holly trees are deer-proof. *See* Clmt. Ex. 5. In any event, because the Contract is unambiguous, pre-contractual negotiations are not relevant to my decision.

In Maryland, the law of objective contract interpretation applies, which provides that the written language embodying the terms of an agreement govern the rights and liabilities of the parties, regardless of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of clear and definite understanding. *Huggins v. Huggins & Harrison, Inc.*, 220 Md. App. 405, 417 (2014) (citing *Dumbarton Improvement Assn v. Druid Ridge Cemetery Co.*, 434 Md. 37, 51 (2013)). As such, "[a] contract's unambiguous language will not give way to what the parties thought the contract meant or intended it to mean at the time of execution." *Dumbarton*, 434 Md. at 51-52. When interpreting a contract, the objective is not to discern the actual mindset of the parties at the time of agreement, but rather to determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant when it was effectuated. *Id.* at 52. An agreement does not become ambiguous merely because the parties, in litigation, offer different interpretations of its language. *Diamond Point Plaza Ltd. P'ship, v. Wells Fargo Bank, N.A.*, 400 Md. 718, 751 (2007).

The Contract is entirely silent on any demand by the Claimant, or promise by the Respondent, to provide deer-proof trees. As this alleged promise is not even suggested by the Contract, the Contract presents no ambiguity on this matter. The Contract contains no language that either side can point to as being susceptible of differing meaning or interpretation concerning the holly trees being deer-proof. All of the evidence concerning whether the Claimant required deer-proof trees, and whether the Respondent promised to provide them, is outside of the plain, unambiguous language of the Contract. The Contract does not require that the Respondent would install only deer-proof trees. As such, there is no evidence that the Respondent's performance of the Contract was inadequate.

Concerning the Claimant's second argument, that the Respondent failed to offer the application of deer-repellent as part of the Contract and his trees were damaged as a result, the testimony offered by each was entirely contradictory as to discussions prior to execution of the Contract. The Claimant alleged that it was not offered, though Mrs. Andrews also testified that she was already familiar with the application of deer repellent from prior experience. The Respondent claimed that it was offered, for an additional fee, and was declined. The parties agreed that after installation the Respondent applied deer repellent twice as a courtesy and offered to continue to do so for a separate charge, which the Claimant agrees he declined.

The Contract itself is clear and unambiguous. It does not require that the Respondent apply deer repellent, regardless of what the parties discussed. As such, it cannot be found that the Respondent's alleged failure to do so was unworkmanlike, incomplete or inadequate under the terms of the Contract. Furthermore, concerning the Claimant's specific argument that an additional service should have been offered but was not, there has been no evidence or authority presented upon which I can find that the Respondent, as a service provider, was required to offer the additional service of applying deer repellent or to suggest that its failure to offer such a

service is actionable. My analysis pertains to the performance of the terms of the Contract, rather than terms the parties might have agreed upon but did not. As such, the parties' disagreement over a service the Contract does not require is not relevant in this matter.

Finally, the Claimant contended that the Respondent failed to honor the Warranty, which the Claimant argued was susceptible to interpretation that it covered damage to the holly trees caused by deer merely because such damage was not expressly excluded. The Respondent countered that it had replaced any plants that did not survive the first year after planting, but the holly trees were not covered by the Warranty because they remained alive. Because the Warranty applied only to plants that failed to survive the first year, it did not apply to damage to the holly trees.

The plain language of the Warranty does not support the Claimant's argument that it applies more broadly than it specifies. The Respondent warranted solely that for a period of one year from the date of planting, "[a]ny plants ***that fail to survive*** will be replaced once, provided plants are properly watered, receive adequate care, and plants have not suffered mechanical damage or damaged [sic] by storm, fire, and the like." (Emphasis added) *See* Clmt. Ex. 1. The Warranty is not ambiguous or susceptible to differing interpretations. For a plant to be covered by the Warranty, and eligible for replacement, it must have failed to survive within one year from the date of planting as a threshold issue; that is, the plant must have died. The Warranty does not speak to mere damage that does not kill the plant, regardless of the type of plant or the cause of damage. If a plant installed by the Respondent has not died within a year of its planting, it is not covered by the Warranty. The Warranty provides no other conditions for its application. Had the parties intended greater Warranty coverage, they were free to agree upon that.

The Claimant agreed that the holly trees survive to the present. He testified that each year they are partially eaten, and their leaves return the following year, when they are eaten

again. However, it has been more than two years since they were planted, and they are still alive. Accordingly, the Warranty does not apply to the holly trees. One cannot reasonably infer that a replacement warranty that pertains exclusively to plants that die within a one-year period can also be read to include plants that do not.

For the reasons set forth herein, the Claimant has not proved by a preponderance of the evidence that the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement. 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).

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.

Jeffrey T. Brown

January 12, 2023
Date Decision Issued

Jeffrey T. Brown
Administrative Law Judge

JTB/at
#201929

PROPOSED ORDER

WHEREFORE, this 22nd day of February, 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.

Chandler Louden

Chandler Louden
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION