IN THE MATTER OF THE CLAIM	*	**BEFORE ERIN H. CANCIENNE,**
OF SCOTT ROYSTON,	*	**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 PAUL JOHNSON,	*	
T/A COMMSERV, LLC,	*	**OAH No.: LABOR-HIC-02-22-00465**
RESPONDENT	*	**MHIC No.: 21 (75) 420**

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PROPOSED DECISION

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STATEMENT OF THE CASE

On March 3, 2021, Scott Royston (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 $32,846.87 for actual losses allegedly suffered as a result of a home improvement contract with Paul Johnson, trading as Commserv, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015).[1] On December 6, 2021,

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

the MHIC issued a Hearing Order on the Claim. On December 16, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On February 16, 2022, and March 10, 2022, I held a hearing at the OAH in Hunt Valley, Maryland.[2] Bus. Reg. §§ 8-407(a), 8-312. Justin Dunbar, Assistant Attorney General, Department, represented the Fund. Robert Westra, 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. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); Code of Maryland Regulations (COMAR) 09.01.03; and 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 offered by the Claimant:

Clmt. Ex. 1 - Contract between the Respondent and the Claimant (Outdoor Contract), January 2, 2020

Clmt. Ex. 2 - Cashier's Check from the Claimant to the Respondent, December 26, 2019

Clmt. Ex. 3 - Contract between the Respondent and the Claimant (Indoor Contract), April 24, 2020

Clmt. Ex. 4 - Not offered.

[2] On February 16, 2022, no witnesses testified, and no exhibits were admitted. After opening instructions, the Respondent requested a brief postponement to continue negotiations with the Claimant. The other parties consented to the postponement and all parties agreed to continue the hearing to March 10, 2022.

Clmt. Ex. 5 - Photographs of the Claimant's backyard, Fall 2020[3]

Clmt. Ex. 6 - Photograph of the Claimant's backyard, January 9, 2022

Clmt. Ex. 7 - Letter from Vincenzo Culotta, Esq. to the Respondent, September 9, 2020[4]

Clmt. Ex. 8 - Petition Hearing Application Packet, July 19, 2021[5]

Clmt. Ex. 9 - Zoning Review, Hearing Checklist, revised May 5, 2016

Clmt. Ex. 10 - Manilla Folder from Baltimore County Zoning Office, undated

Clmt. Ex. 11 - Email from Robert Westra, Esq. to the Respondent, October 5, 2020

Clmt. Ex. 12 - Letters and Emails from Robert Westra, Esq. to the Respondent with proofs of service, May 27, 2021

The Respondent did not offer any exhibits.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, January 11, 2022[6]

Fund Ex. 2 - Hearing Order, December 6, 2021

Fund Ex. 3 - Home Improvement Claim Form, February 19, 2021

Fund Ex. 4 - Letter From MHIC to the Respondent, March 5, 2021

Fund Ex. 5 - License History for the Respondent, February 14, 2022

Testimony

The Claimant testified and presented the testimony of the Respondent and Rosalie "Roz" Johnson, zoning planner for Baltimore County.

The Respondent did not present any witnesses.[7]

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[3] The Claimant did not know the specific date that these pictures were taken.
[4] The date on this letter was typed September 9, 2020, but scratched through and a date of August 26, 2020. For purposes of the exhibit list, the typed date of the letter will be used.
[5] This packet includes the cover letter rejecting the submittal with red markings on the submittal packet to note deficiencies in the submittal. The document contains multiple copies of some, but not all of the documents.
[6] This notice is for the original hearing date of February 16, 2022, but has handwritten notations regarding the postponement and the new hearing date of March 10, 2022.
[7] The Claimant called the Respondent as a witness during the Claimant's *prima facie* case.

The Fund did not present any 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 01-110209.

2. At all relevant times, the Claimant owned and resided in a single-family home on Hillsleigh Court in Nottingham, Maryland (the residence).

3. On January 2, 2020, the Claimant and the Respondent entered into a contract for a large project at the residence's backyard (Outdoor Contract), including installing three multi-level decks, three pergolas, three fire pits, four fire columns, one gazebo, one bench swing, one four person hot tub, a ten foot L-shaped outdoor kitchen, and a picket-type railing and steps with a concrete slab.

4. The original agreed-upon Outdoor Contract price was $123,900.00.

5. The Outdoor Contract stated that work would begin within thirty to forty-five days after the construction documents and permits were approved and issued.

6. The Outdoor Contract stated the project would be substantially completed within 120-150 days after the start of construction.

7. The Outdoor Contract required all disputes between the Respondent and the Claimant arising out of the contract to be submitted for resolution by binding arbitration. Clmt. Ex. 1, p. 4.

8. On December 26, 2019, the Claimant paid the Respondent $41,300.00 as a deposit for the Outdoor Contract.

9. On April 24, 2020, the Claimant and the Respondent entered into a contract for the Respondent to paint the entire interior of the Claimant's home (Indoor Contract) for a total cost of $8,449.00.

10. The Indoor Contract was successfully completed and is not part of the Claimant's allegations against the Respondent.

11. The Claimant did not pay the Respondent anything directly for the Indoor Contract.

12. Instead of having the Claimant pay directly for the Indoor Contract, the Respondent deducted this amount from the deposit for the Outdoor Contract.[8]

13. After deducting the cost of the Indoor Contract, the remaining balance of the Outdoor Contract deposit was $32,851.00.

14. In or around June 2020, the Respondent filed a Petition Application to obtain a variance to the zoning requirements for the Outdoor Contract.

15. The Baltimore County Department of Permits, Approvals and Inspections returned the Petition Application as not sufficient or not meeting all requirements.[9]

16. After the Petition Application was returned, no further submissions were sent to the Baltimore County Department of Permits, Approvals and Inspections.

17. After the Petition Application was returned, the Respondent did not contact the Baltimore County Department of Permits, Approvals and Inspections, to discuss resubmitting or correcting his submission.

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[8] This was testified to by the Claimant, and was contained in Claimant's Exhibit 7.

[9] The date of this decision is unclear. A cover letter for Claimant's Exhibit 8 is dated July 19, 2021 and indicates that the submission is insufficient or does not meet all the requirements. However, the testimony of Ms. Johnson indicated that submissions are processed within a few weeks, and a sticky note attached to the manila folder from the zoning office indicates "sent email w[ith] revision comments 7/1/2020." Regardless of the date, there was no dispute that the submission was rejected and that no further efforts were made to correct the submission after the rejection.

18. On October 5, 2020, the Claimant, through his counsel, requested that the Respondent confer to schedule a mediation.

19. On May 27, 2021, the Claimant, through his counsel, requested the Respondent confer to schedule an arbitration.

20. The Respondent did not respond to either the request to schedule a mediation, or an arbitration.

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); Md. Code Ann., 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).

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); *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 proven eligibility for compensation.

There is no dispute that the Claimant and the Respondent entered into the Outdoor Contract in January 2020 and that the Claimant, paid the respondent $41,300.00 as a deposit for this Outdoor Contract. (Clmt. Exs. 1 and 2). The Outdoor Contact included installing multi-level decks, pergolas, fire pits, fire columns, a gazebo, a bench swing, a four-person hot tub, a ten-foot L shaped outdoor kitchen, and a picket-type railing and steps with a concrete slab. The

total contract price for the Outdoor Contract was $123,900.00. According to the Claimant, the Respondent's first step would be getting the permit. However, from January through the middle of March 2020, the Respondent did not obtain a permit for the Outdoor Contract.

After the middle of March 2020, the COVID-19 pandemic caused several places to close. According to the Claimant, the Respondent told him that the courts were not open, and that the Respondent could not do anything to obtain the permit. The Respondent testified that he submitted a petition for variance in June 2020 approximately. The Respondent testified that the courts were closed and that he was prevented from filing the petition sooner. The Respondent further testified that he spent approximately 100 hours between communications between the zoning office for the county and the landscape architect.[10] Ms. Rosalie Johnson, of the Baltimore County Zoning Office, testified that while the building for her office was closed to the public for a portion of the pandemic, her office was accepting and processing applications throughout the entire pandemic. She stated that the typical time to process a submission is six weeks. Ms. Johnson reviewed the zoning application packet filed by the Respondent, and she is the one who made all the red marks to show deficiencies in that submission. She testified that after rejecting the submission, she does not remember having any additional communications with the Respondent, or receiving any further submissions from the Respondent. No evidence of any additional submission was offered or admitted into evidence at the hearing.

While waiting for the Respondent to obtain a permit for the Outdoor Contract, the Claimant and the Respondent entered into a contract for the Respondent to paint the interior of the residence. (Clmt. Ex. 3.) The Indoor Contract costs $8,449.00. The Respondent completed all of the work under the Indoor Contract to the Claimant's satisfaction. Instead of giving the Respondent an additional payment, the Claimant allowed the Respondent to deduct the Indoor

[10] There was no testimony provided as to who hired the landscape architect, nor the name of this individual.

Contract price from the deposit for the Outdoor Contract. This left an Outdoor Project deposit balance of $32,851.00.

The Claimant asked the Respondent for a refund of the remaining balance of his deposit for the Outdoor Contract, if the courts were not open by July 1, 2020. The Claimant testified that the Respondent had not ordered any materials by that date because the Respondent was waiting for the permit. No work was ever performed in the backyard of the residence under the Outdoor Contract. The Respondent did not refund the $32,851.00 to the Claimant.

Except for the testimony regarding whether or not the zoning office was closed for any period during the COVID 19 pandemic, the facts regarding the Outdoor Contract and the lack of progress on the Outdoor Contract are consistent. The parties agree that there was a contract, a deposit was paid for that contract, a zoning variance had not been obtained, a permit for the work was not issued, and there was no work performed in the residence's back yard.

I find Ms. Johnson's testimony credible that the zoning office was accepting and processing submittals throughout the entire pandemic, and further, I find her testimony credible that after the initial packet was rejected, the Respondent did not submit any additional information or otherwise attempt to resubmit the original packet. There was no evidence that Ms. Johnson had a reason to favor either the Claimant or the Respondent in this case. Ms. Johnson had personal knowledge of her office's operation and no apparent motive to misrepresent her office's operations during the pandemic. The Respondent did not provide any documentation that confirmed the zoning office was closed, or to refute Ms. Johnson's testimony.

The next question is whether the Respondent abandoned the project or the Claimant cancelled the contract. The Outdoor Contract was signed on January 2, 2020. The Outdoor Contract stated that work would begin within thirty to forty-five days after the construction

documents and permits are approved and issued. The Outdoor Contract stated the project would be substantially completed within 120-150 days after the start of construction. However, by July 2020 (over 180 days after the Outdoor Contract was executed and the Outdoor Deposit was paid), no zoning variance had been obtained, no permit had been issued, and no work had started for the Outdoor Contract. And further, the only submission regarding the zoning variance was woefully inadequate missing several pertinent details, including not being drawn to scale, and not showing the proposed improvements at all. Therefore, I find that the Respondent abandoned the project prior to the Claimant demanding a refund of his deposit.

Further, while the Outdoor Contract required the parties resolve any disputes arising out of the contract through arbitration, I find that the Respondent did not respond to the Claimant's attempts to proceed with either mediation or arbitration. Under COMAR 09.08.03.02E (2), when a contract requires that all contract disputes be submitted to binding arbitration, the claimant can "[p]rovide evidence to the Commission that the claimant has made good faith efforts to bring the dispute to binding arbitration which the contractor has either rejected or not responded to." The Claimant provided two communications from his counsel on October 5, 2020 and May 27, 2021 requesting the Respondent participate in either mediation or arbitration. Clmt. Ex. 11 and 12. The Claimant further testified that the Respondent did not respond to either of these letters. Therefore, I find that the Claimant has provided sufficient evidence of good faith efforts to bring the dispute to binding arbitration and the Respondent has not responded to those efforts.

I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations

provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

The Respondent abandoned the Contract without doing any work. While the Respondent asserts that he spent approximately one hundred hours working on the zoning issues and with a landscape architect, I do not find that credible. The submission for a zoning variance prepared by the Respondent was minimal at best and was not sufficient to receive that variance (as explained above). The Respondent did not submit any additional submissions, did not obtain the zoning variance and did not obtain a permit. Therefore, I do not find that the Respondent performed any work of value for the Outdoor Contract. In addition, the Outdoor Contract did not provide for the Respondent to receive any compensation for attempting to obtain, or actually obtaining a zoning variance or a permit prior to starting construction work at the residence.

Accordingly, the following formula appropriately measures the Claimant's actual loss: "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." COMAR 09.08.03.03B(3)(a). The Claimant paid the Respondent $41,300.00 for a deposit for the Outdoor Contract. The Respondent accepted a portion of that deposit ($8,449.00) to pay for the Indoor Contract. Therefore, the Claimant suffered an actual loss of $32,851.00 ($41,300.00 - $8,449.00).

The Business Regulation Article caps a claimant's recovery at $20,000.00 for acts or omissions of one contractor and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss of $32,851.00 exceeds $20,000.00. Therefore, the Claimant's recovery is limited to $20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $32,851.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(a). I further conclude that the Claimant is entitled to recover $20,000.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $20,000.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;[11] and

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

May 25, 2022
Date Decision Issued

Erin H. Cancienne
Erin H. Cancienne
Administrative Law Judge

EHC/da
#198092

[11] *See* Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 20th day of July, 2022, 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.

I Jean White

I Jean White
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION