IN THE MATTER OF THE CLAIM	*	**BEFORE H. DAVID LEIBENSPERGER,**
OF MONICA ROSSELLO,	*	**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 ILAN GOLDBERG,	*	
T/A DETAILZ CONSTRUCTION	*	**OAH No.: LABOR-HIC-02-22-14003**
CORPORATION,	*	**MHIC No.: 21 (75) 997**
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On November 4, 2021, Monica Rossello (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 $ 7,267.00 for actual losses allegedly suffered as a result of a home improvement contract with Ilan Goldberg, trading as Detailz Construction Corporation (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 Office of Administrative Hearings (OAH) received the matter forwarded by the MHIC for a hearing.

On September 23, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Katherine Villareale, 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); 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?

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

Clmt. Ex. 1 - Contract between the Claimant and the Respondent, December 22, 2020; Various Emails between the Claimant and the Respondent, December 9, 14, and 18, 2022.[2]

Clmt. Ex. 3[3] - Email from the Claimant to the Respondent, May 2, 2021

I admitted the following exhibits offered by the Respondent:

Resp. Ex. 1 - Various Emails between the Respondent and the Intuit Resolutions Department, Credit International Corporation, June 14 and 28, 2022, September 22, 2022

Resp. Ex. 2 - Contract between the Claimant and the Respondent, December 22, 2020

Resp. Ex. 3 - Photographs of Wood Materials and Job Progress, undated.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, June 22, 2022; MHIC Hearing Order, June 8, 2022

Fund Ex. 2 - MHIC Licensing History for the Respondent, August 2, 2022

Fund Ex. 3 - Correspondence from the MHIC to the Respondent, October 1, 2021, with the Claimant's Home Improvement Claim Form attached, September 20, 2021, and Correspondence from the Claimant to Whom It May Concern,[4] September 10, 2021

[2] These documents refer to parties named Better Built, LLC (Better Built) and Monica McNeely. At the hearing, no one explained who these parties are. However, both the Claimant and the Respondent entered a copy of the same agreement referring to these parties as an exhibit in their respective cases. In its emails, Better Built also refers to its MHIC License number as the same as the Respondent's. Monica is the Claimant's first name. I therefore conclude that Better Built and Monica McNeely are the Respondent and the Claimant, respectively.

[3] The document marked for identification as Clmt. Ex. 2 was not offered into evidence. I retained a copy of this document with the file in this matter. COMAR 28.02.01.22C.

[4] This correspondence does not identify the name or address of the recipient.

Testimony

The Claimant testified and did not present other witnesses.

The Respondent did not testify as part of his case in defense and only asked that his exhibits be admitted.

The Fund called the Respondent and the Claimant as witnesses in its case.

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 106566.

2. On December 24, 2020 the Claimant and the Respondent entered into a contract to construct a custom desk, cabinet, and shelving unit (Desk Project) in the Claimant's home in Phoenix, Maryland (Contract).[5]

3. Among other things, the Contract called for the desk to be positioned on the center of the wall; for the desktop to be made of solid black walnut; for two end unit open style storage shelves to be constructed of 3/4" walnut plywood to be a maximum of 84" tall; for bridge shelving to connect the open style storage shelves; for drawer faces to be constructed of walnut plywood; and installation of a smaller children's desk made of 3/4 inch to 1 inch plywood with walnut veneer.

4. The original agreed-upon Contract price was $8,065.00.

5. The Contract stated the work would be completed within four to five weeks.

[5] Both parties produced a copy of the same unsigned agreement and offered it into evidence. Both parties referred to the same unsigned agreement in discussing the terms of the Contract. On December 24, 2020, the Claimant made a one-half deposit of the price specified in the unsigned agreement. Neither party argued there was not a binding agreement or that the terms of the agreement were anything other than those contained in unsigned agreement. I therefore conclude that the unsigned agreement produced by the parties constitutes their Contract in this case.

6. On December 24, 2020 the Claimant paid the Respondent $4,032.50.

7. Approximately two to three weeks later, the Respondent informed the Claimant that he had contracted COVID-19.

8. Approximately one month later, the Claimant contacted the Respondent regarding any progress on completing the Desk Project.

9. In April 2021, the Respondent sent workers to the Claimant's home to begin work on the Desk Project.

10. On May 2, 2021, the Respondent sent workers to the Claimant's home to continue work on the Desk Project. By the end of that day, the Respondent's workers had installed a slab of walnut wood as the desktop, veneered walnut plywood cabinet doors, and two built-in cabinets made of veneered walnut plywood on each side of the desk. The cabinet height was approximately 84 inches.

11. The Desk Project following the work performed on May 2, 2021, was incomplete. The desk was not centered on the wall where it was being installed, some cabinet doors were not level, some edges were rough, and there were screw holes that had not been capped. The swivel desk remained to be installed. The Respondent had also purchased custom walnut crown molding for the cabinets, which remained to be installed.

12. On May 2, 2021, the Claimant sent the Respondent an email stating she was terminating the Contract and requesting a refund of her deposit, plus $500.00 to repair her wall. The Claimant complained that the swivel desk, molding, and shelves had not been installed, that the work appeared to be "Ikea grade," that the cabinets were 89 inches and not 108 inches tall, that the air conditioning return vent was not covered by shelving, that the installation was not centered on the wall, and that there were errant drill holes.

13. The Respondent did not respond to the Claimant and did not return to the job.

14. On a date not disclosed by the record after May 2, 2021, the Claimant and her husband removed the desk, cabinets and shelves that had been partially installed by the Respondent and took the materials to a trash dump.

15. The Claimant subsequently hired California Closets to install a desk in her home.

16. Prior to June 14, 2022, the Claimant contacted her credit card company for a refund of the amount paid to the Respondent, $4,032.50. The Claimant has not yet received a refund; her credit card company is currently holding the funds, and in the event the Claimant is not awarded any reimbursement from the Fund she will receive a reimbursement from her credit card company in the amount of $4,032.50.

17. On September 20, 2022, the Respondent contacted the Claimant by email and asked to know the Claimant's out-of-pocket costs, and whether she had an amount in mind to settle the Claim. The Claimant did not respond to the Respondent's email.

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. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The Respondent Did Not Perform an Unworkmanlike Home Improvement

The Claimant has raised four issues with regard to the work performed by the Respondent: (1) that the cabinets were not installed high enough and concomitantly did not cover the air conditioning return vent; (2) that portions of the job remained incomplete, i.e., that the swivel desk, molding, and shelves had not been installed, that edges remained not sanded and screw holes had not been capped; (3) that the project had not been installed correctly, i.e., it was not centered on the wall, and cabinet doors were not level; and (4) that the materials used were of insufficient quality.

Regarding the first issue, the Claimant argued that the desk cabinets should have been the height of her ceiling, 108 inches, and covered the air conditioning return vent on the wall. However, as the Respondent pointed out at the hearing, the Contract clearly calls for a height of only 84 inches, and that is the approximate height of the cabinets the Respondent installed. Therefore, the Claimant has not met her burden to establish this aspect of the home improvement was unworkmanlike.[6]

Regarding the second issue, that portions of the job remained incomplete, the Respondent had not finished work on the project when the Claimant fired him. Certain items remained unfinished because the Claimant chose to terminate the Contract before the job was completed,

[6] In her email to the Respondent terminating the Contract, the Claimant noted the cabinet height to be 89 inches. The Respondent testified the cabinets were installed at a height of 84 inches. The Claimant did not argue that the cabinets were installed in an unworkmanlike manner because they were *taller* than the height specified in the Contract. Moreover, neither party's evidence in this regard is more reliable than the other's, particularly given that neither party produced any actual measurements to corroborate their version of the height. Thus, even if the Claimant had argued that it was unworkmanlike not to install the cabinets at a height of 84 inches, she would have failed to meet her burden to establish the actual height of the cabinets that were installed.

rather than communicate her concerns to the Respondent and allow him to attempt to remedy them. There is no evidence that the Claimant took any steps to resolve the issue with the Respondent once she realized she was unhappy with the state of the work, other than to fire the Respondent.

It makes sense that some items would not have been installed, edges would have remained rough, and screw holes would have remained uncapped before completion of the job. Although the Claimant alluded to communication problems with the Respondent at the hearing, she never established the precise nature of any communication issues. She also testified that he had in fact communicated reasons to her for starting the job late, such as having newborn twins on the way, moving house, and the scheduling of other projects. The Claimant never established that the Respondent was so uncommunicative that any attempt to communicate her concerns to the Respondent to allow him to attempt to remedy them would have been futile.[7]

The third issue is similar to the second. If the Respondent had informed the Claimant that the job was complete and the installation remained not centered on the wall and cabinet doors remained unlevel, that would constitute an unworkmanlike home improvement. But as things stood, the Respondent was not finished with his work at the time the Claimant chose to terminate the Contract. The Respondent testified that several items remained to be done, including detail and finish work, "punch out" items such as completing the cabinet door installations and adjustments. He further testified that the desk and cabinet could have been adjusted to be centered on the wall. I cannot find the Respondent's performance to have been

[7] It is undisputed that after the Claimant sent the email to the Respondent terminating the Contract, he did not respond to that email, nor did he respond to a later communication from her telling him he could retrieve the materials used to construct the Desk Project. Given that the Respondent had been fired with no prior communication regarding the alleged inadequacy of the work, it was not unreasonable for the Respondent to cut his losses and terminate his involvement with the Claimant. He testified that an additional visit to the property would have been necessary to complete the Desk Project, and that it was clear from the Claimant's email that she had no interest in having the Respondent return.

unworkmanlike at the stage where the Claimant chose to terminate the Contract. Had the Respondent been permitted to finish the job, he may well have centered the installation, leveled the cabinet doors, and addressed the Claimant's other concerns, but the Claimant's termination of the Contract foreclosed that possibility.

Regarding the fourth issue, that the materials were of insufficient quality, the Contract called for the use of black walnut for the desktop, and the Claimant takes no issue with the wood used for the desktop itself and described it as beautiful. The Contract called for the use of 3/4 inch walnut plywood for the construction of the end unit storage shelves, that cabinet drawer faces be made of walnut plywood (drawer boxes would be made of cabinet grade plywood), and that the smaller children's desk would be made of 3/4 inch to 1 inch plywood with a walnut veneer. There are no other specifications for the wood materials to be used in the Contract.

The Claimant alleged generally in her testimony and in her email terminating the Contract with the Respondent, that the materials were "Ikea quality." She initially testified that the cabinets were not made of wood, and were veneer only, but then later testified that she did not know if the cabinets were made of wood or not. I interpret the Claimant's argument to be that that Respondent's use of walnut plywood with veneer was unworkmanlike because it was inconsistent with the Contract terms.

The Respondent testified that the cabinets were made of grade A walnut plywood with a veneer, and that this is typical cabinet grade material. He testified that the vendor who supplied the wood has only this one option for walnut plywood and that there were no other local options to purchase walnut plywood. Neither party produced any sample of the materials used, nor any photographs establishing the composition of the materials.

The Claimant has failed to establish that the materials used were not those contemplated by the Contract. The Claimant appears to believe that the wood materials should not have included a veneer, but I cannot determine this from the Contract itself because it is ambiguous. Nor can I determine from any extrinsic evidence outside the Contract, whether the Contract contemplated the use of walnut plywood with veneer, or not.

In determining whether a contract is ambiguous, "Maryland has long adhered to the law of the objective interpretation of contracts." *Calomiris v. Woods*, 353 Md. 425, 435–36 (1999) (citations omitted). "Under the objective view, a written contract is ambiguous if, when read by a reasonably prudent person, it is susceptible of more than one meaning." *Id.* at 436 (citations omitted). "The determination of whether language is susceptible of more than one meaning includes a consideration of the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution." *Id.* (quotation marks and citation omitted). Therefore, when interpreting a contract the court's task is to:

> [D]etermine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed. In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. Consequently, the clear and unambiguous language of an agreement will not give away to what the parties thought that the agreement meant or intended it to mean.

Id. (citation omitted).

In this matter, a reasonable person entering into or reading the Contract could conclude that "walnut plywood" refers to plywood with or without veneer, and therefore the Contract is ambiguous in this respect. By its nature, plywood is layered. The Contract simply lacks the specificity required to exclude walnut plywood with a veneer layer from the meaning of "walnut

plywood." Nothing about the character of the Contract, its purpose, or the facts and circumstances of the parties at the time the Contract was made sheds any additional light on this issue. No party even attempted to define the term walnut plywood.

The Contract makes references to four different kinds of wood: black walnut, walnut plywood, cabinet grade plywood, and plywood with a walnut veneer. One might reasonably infer that because the Contract makes specific reference to only one type of wood with a veneer, the other woods must necessarily not include a veneer. Although that is evidence of the meaning of the words, it does not meet the threshold of establishing the meaning and resolving the ambiguity by a preponderance of the evidence.

Because the terms of the Contract are ambiguous, I could turn to extrinsic evidence outside of the Contract to determine its meaning. *W. F. Gebhardt & Co. v. Am. Eur. Ins. Co.*, 250 Md. App. 652, 666 (2021). However, the Claimant did not present any evidence to attempt to establish that the term "walnut plywood" excluded walnut plywood with a veneer. It is clear from the Claimant's testimony that she was not expecting the veneer, but she did not present any evidence to establish why, such as prior conversations with the Respondent or a review of the materials Respondent said he intended to use.

In addition, the Contract only refers to the use of walnut plywood for certain parts of the Desk Project, namely the end unit storage shelves and the cabinet drawer faces. It is not clear to me that these shelves and drawer faces meant all of the cabinet construction was meant to be walnut plywood, let alone all of the Desk Project. There is no specification in the Contract as to what type of wood should be used at the back of the cabinets and shelves, for example. Thus it is unclear whether veneer wood (or any other type of wood) would have been acceptable to use in those areas of the Desk Project under the Contract.

Moreover, the Respondent testified that the wood he used was typical cabinet grade material, and that it was the only local option for walnut plywood. While this likely informed the Respondent's understanding of the meaning of the Contract terms, I do not find that this testimony alone, without further corroboration, establishes the meaning of walnut plywood in the Contract.

It was the Claimant's burden to establish by a preponderance of the evidence that the Respondent used materials not contemplated by the Contract and, therefore, installed the desk and cabinets in an unworkmanlike manner. The Claimant failed to meet that burden by not presenting evidence establishing what materials were and were not acceptable under the Contract. The Claimant was also unsure about, and could not establish, what materials the Respondent had actually installed. I thus find that the Claimant is not eligible for compensation from the Fund.

Efforts to Resolve the Claim

The Claimant unreasonably rejected a good faith effort by the Respondent to resolve the claim. Bus. Reg. § 8-405(d) (Supp. 2022). The Claimant testified that on September 20, 2022, the Respondent contacted her by email and asked to know her out-of-pocket costs, and whether she had an amount in mind to settle the Claim. However, the Claimant did not respond to the Respondent's email. I find that this was a good faith effort on the part of the Respondent. It was a clear request for the Claimant to make a demand, and there are no circumstances that would indicate it was insincere. Although the Respondent's ovation to the Claimant was shortly before the hearing of this matter, that by itself does not establish that it was not made in good faith.

The Claimant's refusal to even respond was not reasonable. After describing the Respondent's effort to ask for a demand, the Claimant testified that she was more interested in

the "principle" of her claim, rather than the money. This demonstrates the Claimant's desire to see this case through to a hearing regardless of the Respondent's efforts to resolve this matter and is, therefore, unreasonable. Section 8-405(d) patently favors the settlement of claims and requires that if a claimant is going to reject a good faith effort to resolve a claim, the claimant has to have some reason for doing so other than merely preferring a hearing.

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

Whether the Claimant Suffered an Actual Loss

In its closing, the Fund argued that the Claimant had not suffered an actual loss because she testified that, regardless of the outcome of the hearing, she would be refunded the money she paid to the Respondent by her credit card company. However, I find that the Claimant failed to establish any actual loss, regardless of whether she will receive a refund from her credit card company.

As discussed above, "'actual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. §.8-401. MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. Because the Respondent did not abandon the Contract without doing any work, the formula contained in COMAR 09.08.03.03B(3)(a) is inapplicable. Because the Respondent performed some work under the Contract, and the Claimant hired another contractor, California Closets, to complete or remedy that work, the formula contained in COMAR 09.08.03.03B(3)(b) is also inapplicable.

Where, as here, the Respondent performed some work under the Contract and the Claimant has retained another contractor to complete or remedy that work, to establish an "actual loss" the Claimant must prove, among other things, "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 and complete the original contract...." COMAR 09.08.03.03B(3)(c). At the hearing, the Claimant testified that she had not brought evidence of the estimates or costs from California Closets because she did not think it was relevant. Nor did the Claimant testify to any costs from the work done by California Closets. Therefore, the Claimant failed to establish any actual loss.

Regarding the Fund's argument that a refund to the Claimant of the amount paid to the Respondent would foreclose a recovery, the Fund is correct that all three of the formulas for determining actual loss take into consideration the amount a claimant pays to a contractor. COMAR 09.08.03.03B. Thus, a reasonable argument could be made that a refund of the amount paid to the contractor would be equivalent to the claimant having not paid the contractor that amount. However, a refund of the amount paid by a claimant to a contractor would not, in every circumstance, foreclose the possibility of a recovery from the Fund. For example, under COMAR 09.08.03.03B(3)(c), the formula applicable here, if the cost of restoration or repair of the contractor's work was higher than the original contract price and the amount of the refund, a claimant may still be entitled to recovery. However, that is not the factual circumstance presented by this case.

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 & 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.

H. David Leibensperger

December 14, 2022
Date Decision Issued

H. David Leibensperger
Administrative Law Judge

HDL/cj
#202454

PROPOSED ORDER

WHEREFORE, this 14th 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.

Joseph Tunney

Joseph Tunney
Chairman
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION