

<p>IN THE MATTER OF THE CLAIM</p> <p>OF RENEE KEARNEY,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF TAIWO SHIELDS,</p> <p>T/A APEX HOME PROS, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE EDWARD J. KELLEY,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-23-14117</p> <p>* MHIC No.: 23 (75) 70</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On September 16, 2022, Renee Kearney (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$17,177.00 for actual losses allegedly suffered as a result of a home improvement contract with Taiwo Shields, trading as Apex Home Pros, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On May 10, 2023, the MHIC issued a Hearing Order on

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).
² Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

the Claim. On May 22, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On July 25, 2023, I held a remote hearing on the Webex video conferencing platform. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1). Nicholas Sokolow, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. The Respondent did not appear for the hearing.

After waiting over fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. On June 8, 2023, the OAH sent a Notice of Hearing (Notice) by regular and certified mail to the Respondent's address with the MHIC. COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1). The Notice stated that a remote hearing was scheduled for July 25, 2023, at 9:30 a.m., on the Webex platform. The Notice provided instructions on how to use the platform and further advised that failure to attend the hearing might result in "a decision against you."

The United States Postal Service did not return the Notice sent by regular mail, and the OAH received a receipt for the Notice sent certified mail showing that the mail was received. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. I determined that the Respondent received proper notice, and I proceeded with the hearing. COMAR 28.02.01.05A, C.

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; and COMAR 28.02.01.

ISSUE

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following Joint Exhibit on behalf of the Claimant and the Fund:

Joint Ex. 1 – A 12-page document that included the following:

- Letter from the Claimant to the Respondent, June 8, 2022 (pp. 1-4)
- Email from the Respondent to the Claimant, June 11, 2022 (pp. 5-7)
- Letter from the Claimant to the Respondent, June 11, 2022 (p. 8)
- Email from the Respondent to the Claimant, June 11, 2022 (p. 9)
- Email from the Respondent to the Claimant, June 22, 2022 (p. 10)
- Email from the Respondent to the Claimant, June 23, 2022 (p. 11)
- Email from the Claimant to the Respondent, June 27, 2022 (p. 12)

I admitted the following exhibit offered by the Claimant:

Clmt. Ex. 1 – An 8-page document that included the following:

- Cover letter, July 25, 2023 (pp. 1-2)
- Contract, June 25, 2021 (pp. 3-4)
- Check, June 25, 2021 (p. 5)
- MHIC contract requirements, June 25, 2023 (pp. 6-8)

I admitted the following exhibits offered by the Fund:

GF Ex. 1 – Notice of Hearing, June 8, 2023

GF Ex. 2 – Hearing Order, May 10, 2023

GF Ex. 3 – Letter from the MHIC to the Respondent, dated September 28, 2022; Home Improvement Claim Form, September 16, 2022

GF Ex. 4 – Licensing History, June 27, 2023

No exhibits were submitted on behalf of the Respondent.

Testimony

The Claimant testified.

The Respondent was not present to testify or offer any witness testimony.

The Fund did not offer any witness testimony.

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.
2. On June 25, 2021, the Claimant and the Respondent entered a contract whereby the Respondent agreed to construct a sunroom at the Claimant's residence (Contract).
3. The total Contract price was \$51,532.00.
4. The Contract stated that \$6,250.00 was for architectural drawings, permits, and survey fees. The remaining \$45,282.00 was for demolition of the existing structure and construction of the sunroom.
5. The Contract provided that one-third of the Contract price, \$17,177.00, was due upon execution of the Contract. Another third of the Contract price, \$17,177.00, was due once materials were delivered and work began. The final third of the Contract price, \$17,178.00, was due upon completion.
6. On June 25, 2021, the Claimant paid the Respondent \$17,177.00 pursuant to the Contract.
7. The Contract did not have a start date and an end date. However, it was agreed the project could not begin until the Respondent obtained a zoning variance and a building permit from the City of Bowie.
8. The Respondent obtained the building permit in March 2022. The Claimant did not object to the nine-month delay in obtaining the building permit, which was necessary to begin construction.

9. At the end of March 2022, the Claimant began regularly communicating with the Respondent about when the project would begin.
10. From the end of March 2022 through the end of May 2022, the Claimant and the Respondent communicated frequently about the project, but no work took place.
11. In May 2022, the Respondent sent a structural engineer to survey the property.
12. The Respondent planned and prepared to begin demolition of the existing structure on June 6, 2022.
13. The Respondent expected the second installment to be paid when materials were delivered and construction began as set forth in the Contract.
14. The Claimant refused to pay the second installment until construction was fifty percent completed.
15. The Claimant stopped the Respondent from beginning demolition of the project on June 6, 2022, based on her belief that the Respondent had not complied with Maryland's Miss Utility Dig Law, which requires the marking of underground infrastructure prior to excavation of the property.
16. On June 8, 2022, the Claimant sent the Respondent a letter listing her concerns with the project's delay and requesting project timelines with milestones and completion dates.
17. On June 11, 2022, the Respondent sent the Claimant a schedule that had construction beginning in June 2022 and a project completion date of August 6, 2022.
18. On June 11, 2022, the Claimant wrote the Respondent a letter cancelling the Contract and requesting a refund of the \$17,177.00 she previously paid.
19. On June 23, 2022, the Respondent sent the Claimant a letter identifying the services rendered to date – architectural drawings, permitting, surveying, and demolition preparation – and offered a refund of \$836.00.

20. The Respondent did not abandon the project.

21. The Claimant paid a licensed contractor, Choice Construction Firm, LLC, \$40,668.00 to complete the project to the Contract's specifications.

DISCUSSION

APPLICABLE LAW

“The Fund was established to provide an additional remedy for homeowners who suffered actual loss due to unsatisfactory work performed by a home improvement contractor.” *Brzowski v. Maryland Home Imp. Comm'n*, 114 Md. App. 615, 628 (1997); Bus. Reg. § 8-405(a) (Supp. 2023); *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. Any award from the Fund must be based on actual loss. *Brzowski*, 114 Md. App. at 631.

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).

PARTIES POSITIONS

The Claimant states her actual loss is \$17,177.00, which is the amount she paid to the Respondent on June 25, 2021. The Claimant argued that she is entitled to recover this entire amount because the Respondent failed to perform any construction work on the project as required by the Contract.

The Respondent did not appear at the hearing, after proper notice, to present evidence or argue on his behalf.

The Fund asserted that the Claimant did not establish that the Respondent performed an act or omission or engaged in any misconduct under the category of an unworkmanlike, inadequate, or incomplete home improvement. The Fund argued that the Claimant's allegations involve a breach of contract, which is outside the purview of the Fund, and therefore, the Claimant is not entitled to reimbursement from the Fund.

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

ANALYSIS

It is undisputed that the Claimant and Respondent entered a Contract whereby the Respondent agreed to construct a sunroom at the Claimant's residence. On June 25, 2021, prior to any work being performed, the Claimant paid the Respondent \$17,177.00 pursuant to the terms of the Contract. It is also undisputed that the Respondent did not perform any construction work under the Contract before the Claimant cancelled the Contract. The Respondent did, however, obtain a variance and building permit and took steps to begin construction in June 2022. Construction did not begin because the Claimant cancelled the Contract. The issue is whether the Claimant sustained an actual loss compensable by the Fund as a result of the Respondent's conduct.

As detailed above, an actual loss is defined as “. . . the costs of restoration, repair, replacement, or completion that *arise from an unworkmanlike, inadequate, or incomplete home improvement.*” Bus. Reg. § 8-401 (emphasis added). As such, I must determine whether any action, omission, or misconduct by the Respondent led to an unworkmanlike, inadequate, or

incomplete home improvement. *Id.*; *see also* Bus. Reg. § 8-405(a) (Supp. 2023); COMAR 09.08.03.03B(2).

The terms “unworkmanlike,” “inadequate,” or “incomplete” home improvement are not defined in the applicable statutes or regulations. *See* Bus. Reg. §§ 8-401 through 8-411 (2015 & Supp. 2023); *see also* COMAR 09.08.03.01 through .03. Nevertheless, it is undisputed that no “unworkmanlike” or “inadequate” home improvement occurred in this case because the Respondent did not begin construction on the project.

What remains is whether there was an “incomplete” home improvement. While undoubtedly the Respondent did not complete the sunroom that was the subject of the Contract, the analysis must focus on whether the incomplete work was due to the Respondent’s action, omission, or misconduct. Bus. Reg. § 8-405(a) (Supp. 2023); COMAR 09.08.03.03B(2). To prevail under the notion that the Claimant sustained an actual loss due to an incomplete home improvement, the Claimant must show that the Respondent acted in some unilateral and unjustified manner to leave the Contract incomplete. *See* Bus. Reg. § 8-605(1). The Claimant failed to meet this burden.

The Contract was signed in June 25, 2021, but it took nine months to obtain a variance and building permit to begin construction. It is undisputed that the Respondent took action to obtain the required building permit, and the Claimant acknowledged the nine-month delay in obtaining the variance and the building permit was not the Respondent’s fault. Thus, this substantial delay is not held against the Respondent.

After the building permit was obtained in March 2022, construction did not begin immediately, but the parties were communicating regularly regarding materials and scheduling. The evidence shows that the delay in starting construction after receipt of the building permit resulted from design changes, material availability, and scheduling conflicts, which could be

attributed to both parties. Ultimately, in June 2022, the Claimant demanded the Respondent provide a final construction schedule, which the Respondent did, identifying a start date in June 2022 and a completion date in August 2022. The Respondent expected the second installment of the Contract to be paid when materials were delivered and construction began as set forth in the Contract. The Claimant was not willing to pay the second installment until a substantial portion of the project was completed, and she responded by cancelling the Contract before work could begin. The Claimant demanded a refund, and the Respondent offered her \$836.00, which reflected the Respondent's calculations of the Claimant's \$17,177.00 initial payment minus services rendered on the project.³

Once the Claimant cancelled the Contract, the Respondent was no longer obligated to perform any additional work. Thus, the incompleteness of the home improvement was not due to the Respondent's actions, omissions, or misconduct; rather, the work remained incomplete because the Claimant cancelled the Contract which stopped any required performance by the Respondent.⁴

While I understand the Claimant's frustration with this situation, the Fund does not compensate claimants for all unsuccessful home improvement projects. Instead, the Fund exists to compensate claimants for an actual loss, as narrowly defined. *Brzowski*, 114 Md. App. at 631; Bus. Reg. §§ 8-401, 8-405(a) (Supp. 2023); COMAR 09.08.03.03B(2). For the reasons stated, I find that the Claimant has not met her burden to prove that she suffered an actual loss resulting from the Respondent's "unworkmanlike," "inadequate," or "incomplete" home improvement. *See* Bus. Reg. § 8-407(e)(1); *see also* Md. Code Ann., State Gov't § 10-217 (2021); COMAR

³ The Claimant acknowledged that the Respondent performed some services under the Contract, such as obtaining the variance and the building permit, completing design drawings, surveying the project site, and preparing for demolition, but she did not assign a value to any of these services.

⁴ Although the statute does not use the term "abandoned," that term is used in the regulation when determining the amount of an award from the Fund. *See* COMAR 09.08.03.03B(3). The Respondent clearly did not abandon the Contract; rather, the Claimant cancelled the Contract.

09.08.03.03A(3). As the Fund argued, the Claimant might be entitled to recovery against the Respondent under a different legal theory in a different forum. *Brzowski*, 114 Md. App. at 630-31. I find, however, that she has failed to establish that she is eligible for compensation from the Fund in this forum as she has not proven that she sustained an actual loss as narrowly defined. Bus. Reg. § 8-405(a) (Supp. 2023); COMAR 09.08.03.03B(2).

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. *Brzowski v. Maryland Home Imp. Comm'n*, 114 Md. App. 615, 628-631 (1997); Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(2).

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.

October 6, 2023
Date Decision Issued

EJK/ja
#206470

Edward J. Kelley

Edward J. Kelley
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 9th day of November, 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**