

The Maryland Home
Improvement Commission

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**BEFORE THE
MARYLAND HOME IMPROVEMENT
COMMISSION**

v. William Nicholas Porter
t/a Porter & Porter Floor Coverings, Inc.
(Contractor)
and the Claim of
Mildred Osborne
(Claimant)

MIIC No.: 07 (75) 1689

FINAL ORDER

WHEREFORE, this February 24, 2011, Panel B of the Maryland Home

Improvement Commission **ORDERS** that:

1. The Findings of Fact set forth in the Proposed Order dated September 1, 2010 are **AFFIRMED**.
2. The Conclusions of Law set forth in the Proposed Order dated September 1, 2010 are **AFFIRMED**.
3. The Proposed Order dated September 1, 2010 is **AFFIRMED**.
4. This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.

I. Jean White
I. Jean White, Chairperson
PANEL B

MARYLAND HOME IMPROVEMENT COMMISSION



IN THE MATTER OF THE CLAIM OF	*	BEFORE A. ELIZABETH ROJUGBOKAN,
MILDRED D. OSBORNE	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	*	OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	*	OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	*	OAH NO.: DLR-HIC-02-09-38925
OMISSIONS OF WILLIAM N. PORTER,	*	MHIC NO.: 07(75)1689
t/a PORTER & PORTER FLOOR	*	
COVERINGS, INC.	*	

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RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On July 24, 2008, Mildred D. Osborne (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$20,000.00 for actual losses she allegedly suffered as a result of a home improvement contract with William N. Porter t/a Porter & Porter Floor Coverings, Inc. (Respondent).

I held a hearing on April 9, 2010 at the Largo Government Center, 9201 Basil Court, Largo, Maryland. Md. Code Ann., Bus. Reg. §8-312(a) and 8-407(c)(2)(i) (2010). Kris M. King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department),

represented the Fund. Daniel R. Bendt, Esquire, represented the Claimant, who was present. Thomas A. McManus, Esquire, represented the Respondent, who was present.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §10-201 through 10-226 (2009), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 28.02.01.

ISSUE

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

SUMMARY OF THE EVIDENCE

Exhibits

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

- CI #1 Proposal and Acceptance, June 12, 2005
- CI #5 Letter to Whom It May Concern from Carpet Queen and Floors, undated

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

- Fund #1 Notice of Hearing, October 30, 2009
- Fund #2 Hearing Order, October 9, 2009
- Fund #3 Department Licensing History, April 7, 2010
- Fund #4 Home Improvement Claim Form, received by the MHIC on July 24, 2008
- Fund #5 Letter from John Borz, Chairman to the Respondent, July 25, 2008

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

- Resp #1 Letter from Stephan Baker, The HomeBiz Inspection Team, To the Claimant, June 30, 2006

- Resp #2 Letter from Ken Storm, Home Flooring Center, Inc., to the Claimant, July 21, 2008
- Resp #3 Invoice from J.J. Haines & Company, June 20, 2006
- Resp #4 Resume for Frank J. Kaiss, June 12, 2007
- Resp #5 Letter from Mr. Kaiss to Fred Willig, MIIC Investigator and photographs, May 20, 2007

Testimony

The Claimant testified and presented the following witness:

- David Brown, Manager, Bay Country Floors, accepted as an expert in the installation of hardwood flooring

The Respondent testified and presented the following witnesses:

- P. Porter, the Respondent's brother and company salesman
- Frank J. Kaiss, accepted as an expert on issues of home improvement contracts and the workmanship, inadequacy of the installation of hardwood flooring
- J. Porter, the Respondent's brother and company installer

The Fund did not present any witnesses.

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 #05-51816.
2. The Respondent's company is run by three brothers: Paul Porter, the salesman, James Porter, the installer and the Respondent.
3. Sometime in June 2005, the Claimant approached the Respondent to install hardwood flooring over the concrete subfloor on the first floor of her home. The Respondent

recommended the installation of laminate flooring, but the Claimant refused. She insisted on hardwood flooring.

4. The Respondent's installer measured the moisture throughout the first floor of the Claimant's house. He lifted up the edges of the carpet to measure the moisture of the concrete pad. At the time of the reading, the moisture in the concrete was within the low to normal range.

5. On June 12, 2005, the Claimant and the Respondent entered into a contract to remove the existing carpeting and install Tiete Chestnut BR 1-11 hardwood flooring on the entire first floor (with the exception of the foyer) and in the Claimant's second floor bedroom and recreation room of the Claimant's house.

6. There were no approximate start or completion dates for the work designated in the contract document.

7. The original agreed upon contract price was \$20,000.00. The Claimant financed the cost.

8. On the day of the installation, the Respondent again measured the moisture on the concrete pad, which was in the acceptable range in accordance with industry standards. The concrete had to be that dry to ensure that the adhesive used on the floor would hold.

9. After measuring the moisture in the room, the Respondent installed the Claimant's first floor and second floor hardwood flooring. The work was completed on the second floor in a workmanlike manner.

10. On or about July 12, 2005, the Claimant telephoned the Respondent to report that the first floor wood floors started coming up around the edges of the room and warping.

11. The Respondent suggested that moisture might be entering the Claimant's home through either the windows or doors.

12. The Claimant caulked around the windows and doors in an attempt to reduce the moisture in her home. The Claimant's first floor hardwood floors, however, continued to come up and warp.

13. On June 14, 2006, Stephen Baker of the HomeBiz Inspection Team conducted a visual inspection of the Claimant's first floor in the presence of the Claimant and the Respondent.

14. Mr. Baker noticed high to excessively high moisture levels on the concrete pad. The readings of the concrete slab from within the home, in the eat-in kitchen and rear solarium, provided unusually high readings, between 20% and 25% moisture. A surface with a 20% moisture is considered wet and non-paintable while 25% is considered excessively wet.

15. A vapor barrier is a sheet that resists the passage of moisture through the concrete floor.

16. A water chemical sealant protects against water penetrating through the surface of the concrete floor.

17. The Respondent **did not** use a vapor barrier or a water chemical sealant on the Claimant's concrete slab.

18. Mr. Baker recommended the installation of a chemical sealant on the concrete prior to laying down any new flooring.

19. Mr. Baker recommended the replacement of 70% of the floor as well as the use of a chemical sealant, known as Meta Seal concrete sealer (Meta Seal).

20. On June 20, 2006, the Respondent ordered four gallons of Meta Seal for the Claimant's floor.

21. On July 27, 2006, the Respondent installed a second hardwood floor at the Claimant's home, in accordance with Mr. Baker's recommendations, at no additional cost to the Claimant.

22. Sometime in 2007, the Claimant again began having problems with the wood coming up and warping on the first floor hardwood floors.

23. On May 4, 2007, Frank Kaiss, a MHIC expert, examined the Respondent's work. There was underlying moisture on the concrete slab not attributable to any work performed by the Respondent. Mr. Kaiss recommended that the Respondent merely repair a few minor areas of the Claimant's hardwood flooring.

24. The Respondent returned a third time to complete the repairs, as recommended by Mr. Kaiss, at no additional charge to the Claimant.

25. On July 2, 2007, the Claimant replaced all the windows in her home. Sometime in August 2007, the Claimant installed a sunroom in her home to better insulate her back door. The Claimant, however, continued to have problems with the wood coming up and warping of her hardwood floors on the first floor.

26. On July 21, 2008, Ken Storm of Home Flooring Center, Inc. examined the Respondent's work. Mr. Storm recommended that the Claimant use a moisture barrier on the concrete, such as "Underfloor" or "Sofsound", to address the moisture problem with her concrete.

27. On July 24, 2008, the Fund received the Claimant's Fund claim in the amount of \$20,000.00 relating to the work performed by the Respondent.

28. Sometime after July 24, 2008, the Claimant hired a company called Carpet Queen to install laminate flooring on her first floor instead of hardwood flooring. The Claimant has not had any further problems with moisture since the laminate flooring was installed.

DISCUSSION

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Md. Code Ann., Bus. Reg. §8-405(a) (2010). *See also* COMAR 09.08.03.03B(2). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. §8-401 (2010).

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

Although the initial work performed by the Respondent on or about June 2005 involved the installation of hardwood floor on the first and second floor; there is no dispute that the work on the second floor was performed well. The only issue before me is whether the work performed on the first floor during the final installation was performed in a workmanlike, adequate and complete manner. After considering the testimony and documentary evidence presented, I conclude that it was performed in a workmanlike, adequate and complete manner. As a result, the Claimant is not entitled to reimbursement from the Guaranty Fund.

The Claimant expressed her frustration with the Respondent’s first, second and final installation of new hardwood flooring on the first floor of her home.¹ She identified photographs she took over the years as work was being performed by the Respondent. The Claimant could

not, however, recall whether her complaints regarding the quality of the Respondent's work related to the first, second or final installation of hardwood flooring in her home.

The Claimant testified that after the final installation, she refused to have the Respondent return, choosing to hire a second contractor, Carpet Queen. That company installed a sealant on the concrete, padding and laminate flooring. The Claimant maintained that the work performed by the Respondent was poor because she has not had any problems with Carpet Queen's laminate flooring installation.

On cross-examination, the Claimant admitted that she contracted for the Respondent to install hardwood flooring despite his recommendation to install laminate flooring. She also acknowledged that the Respondent returned two times to install new hardwood flooring on her first floor at no expense to her.

Mr. Brown testified on the Claimant's behalf concerning his familiarity with BR 1-11 hardwood flooring, the product installed by the Respondent. His company sells BR 1-11 products. According to Mr. Brown, the normal and customary practice when installing this product is to first allow twenty-four to forty-five hours of adhesive drying time before the floor can be installed.¹ In his opinion, if the Respondent had to wait more than that, it was a clear sign that there was a moisture problem on the Claimant's concrete pad.

¹ Because the focus of this hearing was the final installation of new hardwood floor on the Claimant's first floor, the Claimant was directed to focus her testimony solely on that issue.

² According to Mr. Brown, if the sealant was not dry in 7 days, the Respondent should not have installed the flooring. He evaluated the piece of hardwood that was removed from the Claimant's floor. He removed the glue from the back of the wood and inspected it. He noted that the glue had not cured, which means there is a moisture problem in the Claimant's home.

He then commented on the Claimant's testimony regarding the Respondent's work.³ On cross-examination, Mr. Brown admitted that he has never spoken to the Claimant regarding the work, never seen the contract describing the scope of work, and never inspected the hardwood flooring installed by the Respondent.⁴ Mr. Brown's background is in the installation of carpet, not hardwood flooring. Although he is familiar with the BR 1-11 product, he has no training in this area. He did not persuade me that BR 1-11 product installed by the Respondent improperly or in an unworkmanlike or incomplete manner.

The Respondent testified and presented the testimony of Mr. Kaiss, a MHIC independent expert who inspected his work on May 4, 2007 as well as the testimony of his brother, Paul, who was responsible for selling the company's floor coverings and arranging home installations.

The Respondent explained that he performed the installation of the Claimant's hardwood flooring three times. The Respondent conceded that during the first two installations, some of the work performed was not adequate. He noted, however, that he repeatedly returned and installed new flooring in the Claimant's home on two occasions in accordance with the recommendations of independent experts, Mr. Brown of HomeBiz and Mr. Kaiss of Frank J. Kaiss & Associates. The additional work was performed at no cost to the Claimant. The Respondent's brother Paul testified concerning the scope of work and the steps he took to ensure the proper conditions for installation. Findings of Fact #4 and 8.

Mr. Kaiss testified on the Respondent's behalf regarding the inspection he performed on

³ Mr. Brown then addressed the comments made by the Claimant regarding the Respondent's first installation and/or second installation of new hardwood flooring on her first floor. Since the issue before me is regarding the third installation, I do not find Mr. Brown's comments regarding this issue to be relevant to the issue before me.

⁴ Mr. Brown appeared at the request of the Claimant's attorney. Mr. Brown's company regularly works with the law firm of the Claimant's attorney. This impacted his credibility, because it suggests that he appeared, merely as a favor to the Claimant's attorney – since he had never met the Claimant before, never evaluated her work and could not offer an opinion regarding the quality of the Respondent's final installation.

May 4, 2007. In preparation for the inspection, he reviewed the written complaint to familiarize himself with the concerns noted by the Claimant. In 2007, Mr. Kaiss recommended that the Respondent make repairs estimated at \$4,513.00, which the Respondent corrected. In his opinion, the Respondent to date has done all he could to make corrections to alleviate the Claimant's concerns. Mr. Kaiss determined that the Claimant had a pretty bad moisture problem in her home due to the builder's failure to seal the concrete pad.

Based on the evidence presented, I find that the Claimant did not meet her burden of proof. I did not find the Claimant's testimony to be credible because it is not clear that she had any legitimate complaint with the third and final installation. Most of the complaints addressed by the Claimant had been addressed in subsequent repair work performed by the Respondent between 2005 and 2007.

I do not find Mr. Brown testimony to support the Claimant's theory that the Respondent's final installation was performed in an unworkmanlike, poor or inadequate manner. Mr. Brown never inspected the final installation performed by the Respondent. Mr. Brown did not challenge the multiple moisture readings taken by the Respondent which demonstrated that prior to installation, the moisture in the room was within the appropriate range. Mr. Brown conceded that it was possible for the moisture in the Claimant's home to fluctuate over time.

I am not persuaded by the Claimant's argument that the Respondent failed to fully advise her of any problems associated with installing hardwood floor. I find that the Claimant insisted on the installation of hardwood flooring and the Respondent obliged her. There was no evidence presented to suggest that the standard in the industry required the installation solely of laminate flooring under the facts and circumstances of this case. Nor was there any evidence to suggest that a competent flooring installer was required to seal the concrete subfloor, which Mr. Kaiss

maintained was the responsibility of the Claimant's builder. Notably, the Claimant has not had any problems with the laminate flooring installed by the Claimant's remedial contractor. This fact does not, however, demonstrate that the Respondent's installation was outside the standards of the industry. I am compelled to conclude that the Claimant has not demonstrated an "unworkmanlike, inadequate, or incomplete home improvement." Therefore, the Claimant's fund claim is without merit and is hereby dismissed.

CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained an actual monetary loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §8-401 (2010).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim.

July 1, 2010
Date decision mailed


A. Elizabeth Rojuzbookan
Administrative Law Judge

AER-
#114643

IN THE MATTER OF THE CLAIM OF	*	BEFORE A. ELIZABETH ROJUGBOKAN,
MILDRED D. OSBORNE	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	*	OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	*	OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	*	OAH NO.: DLR-HIC-02-09-38925
OMISSIONS OF WILLIAM N. PORTER,	*	MHIC NO.: 07(75)1689
t/a PORTER & PORTER FLOOR	*	
COVERINGS, INC.	*	

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FILE EXHIBIT LIST

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PROPOSED ORDER

WHEREFORE, this 1st day of September 2010, 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.

J. Jean White

*I. Jean White
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION