

IN THE MATTER OF THE CLAIM * BEFORE JEROME WOODS, II,
OF KEITH MONTGOMERY * 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-02-12-32192
OMISSIONS OF ROSA CANALES * MHIC NO.: 11 (90) 999
T/A NIXON CONSTRUCTION *
COMPANY, LLC *

* * * * *

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 September 19, 2011, Keith Montgomery (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$13,631.00 for an actual loss suffered as a result of home improvement work performed by Rosa Canales, t/a Nixon Construction Company, LLC. (Respondent).

I held a hearing on March 25, 2013, at Wheaton Park Office Complex, 11510 Georgia Avenue, Suite 190, Wheaton, Maryland 20902 on behalf of the MHIC. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2010). The Claimant appeared and represented himself.

Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Respondent appeared and represented herself.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the Office of Administrative Hearings (OAH). Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 09.08.03; COMAR 28.02.01.

ISSUE

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

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted the following exhibits, which I admitted into evidence:

- Cl. #1 – Service Contract, dated March 4, 2010
- Cl. #2A – Sales Statement, dated April 13, 2010
- Cl. #2B – Invoice, dated April 13, 2010
- Cl. #3 – Copy of check # 123 for \$4,250.00 paid to Respondent
- Cl. #4 – Contract Addendum with Electrical Permit, dated May 18, 2010
- Cl. #5 – Photograph of note to inspector
- Cl. #6 – Additional Terms and Conditions to contract, undated
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- Cl. #13 – Color photograph of sink
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- Cl. #36 – Capitol Floors, Inc. invoice, dated March 17, 2010
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- Cl. #40 – Color photographs of support beam, undated
- Cl. #41 – Color photograph of bricks, undated
- Cl. #42 – Email from Otis Perry to Claimant, dated March 23, 2010
- Cl. #43 – Proposed Resolution, undated
- Cl. #44 – Email from Respondent to Claimant, dated May 5, 2010
- Cl. #45 – Color photographs of unfinished room, undated

The Fund submitted the following exhibits, which were admitted into evidence:

- Fd. #1 - Memo from Sandra Sykes, OAH to Legal Services, dated February 7, 2013
- Fd. #2 - Affidavit of Thomas Marr, MHIC, dated February 22, 2013
- Fd. #3- Notice of Hearing, dated February 20, 2013
- Fd. #4- License Registration history, dated January 22, 2013
- Fd. #5 - September 29, 2011 letter from the MHIC to the Respondent

The Respondent did not offer any exhibits for admission into evidence:

Testimony

The Claimant testified on his own behalf.

The Respondent testified on her own behalf.

The Fund called no witnesses.

FINDINGS OF FACT

Having considered the evidence, 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 with the MHIC License #125742.
2. On March 23, 2010, the Claimant entered into a contract with the Respondent to demolish part of the Claimant's kitchen, remove construction debris, and perform the following work. Specifically, the contract required the following:
 - Install new cabinets, upper lower and pantry, as well as appliance cabinet faces for refrigerator and dishwasher, including installation of fixtures/handles. Cabinets and fixtures to be supplied by Claimant.
 - Install crown molding, supplied by Claimant.
 - Install sink, faucet, garage disposal, and pure hot/cold water filter, items supplied by Claimant.
 - Install appliances: gas range (uncap existing line) built in refrigerator, dishwasher (water hookups for refrigerator and dishwasher), range hood, appliances supplied by Claimant.
 - Install beam as per architect drawings, need to confirm with architect for final specifications.
 - Move external vent hole, brick in old location.
 - Remove sliding glass door and brick in new doorway.
 - Install new exterior door to patio and a new fire-grade door to the garage, doors supplied by Claimant.

- Level garage/patio door area and prep it for wood flooring.
- Install glass tile backsplash around sink and range hood area, tile materials to be supplied by Claimant.
- Repair walls with drywall where required, including insulating one wall of garage around new door.
- Plaster and apply primer to visible drywall (leave ready to paint).
- Electrical work: install six recessed ceiling lights and up to two additional light boxes over the sink, cabinet lighting, (inside and under), install accessories, switches, fixtures, bulbs, ballasts, electrical and cable outlets, covers, cabinets and over the sink lighting to be supplied by Claimant.

3. The amount of the contract on March 23, 2010 was \$18,300.00. Nixon Elvir Contorero signed the contract on behalf of the Respondent. The Respondent gave Mr. Contorero permission to act on her behalf for the duration of the entire project. Mr. Contorero was the project manager and the then husband of the Respondent.

4. On April 13, 2010, the Claimant and the Respondent's project manager agreed that the Claimant would pay \$1,400.00 for permits. Additionally, the Respondent agreed to remodel two of the Claimant's bathrooms in the following manner, based on the written contract:

- Mold remediation for first floor bathroom.
- Repair all spaces between drywall in required areas due to insulation, a/c and plumbing jobs.
- Do all plumbing work necessary for sink install in master bathroom and install steam generator.

The cost of the bathrooms was \$9,000.00.

5. The total price of the contract was \$30,200.00.
6. The Claimant paid the Respondent \$29,149.00 in accordance with the contract.
7. The project began approximately the first week of April 2010.
8. During the first week of June 2010, the Respondent's workers, unexplainably, did not report to the property as required to work on the project. The Claimant was present at the property and missed work in order to be there.
9. When the Respondent's workers installed the pedestal sink in the downstairs bathroom, they damaged the floor tiles with deep scratches.
10. The Respondent utilized workers whose primary language was Spanish. The Claimant obtained the services of a friend (Christian) who was fluent in Spanish in order to assist with communication between the workers and the Claimant. The Claimant sent written correspondence to the project manager informing him that Christian speaks Spanish and that he should include Christian on all email correspondence between the Claimant and the Respondent.
11. When the Respondent's workers removed a sink and light fixture from the downstairs bathroom that that was supposed to be reused, they damaged the items and they could not be reused.
12. The workers who damaged the tile were terminated by the Respondent from working on the project because of their poor workmanship regarding cleanliness and because they damaged the floor.
13. Throughout the duration of the project, the Claimant frequently traveled with his job but was always available for communication with the Respondent's project manager via telephone or email if necessary.

14. On July 22 and August 6, 2010, the Claimant sent correspondence to the project manager inquiring as to when the project would be completed.

15. As of August 6, 2010, the work on the project was not finished. On that day, the Claimant and the project manager were supposed to meet to discuss the final work schedule. The project manager was not able to meet, and the Respondent did not send anyone to meet with the Claimant in lieu of the project manager.

16. On August 9, 2010, the project manager sent correspondence to the Claimant informing him that as a result of injuries he sustained in an accident, the Respondent would be unable to complete the project.

17. On August 10 and August 31, 2010, the Claimant sent correspondence to the project manager and also asked a mutual friend to contact the project manager to inform the project manager that the Claimant would be flexible to work with any schedule necessary for the Respondent to complete the project.

18. The project manager did not respond to the Claimant nor did anyone else respond on behalf of the Respondent.

19. As of August 30, 2010, a bathroom vanity and kitchen countertop had not been installed. The bathroom plumbing had been completed except elements of the shower plumbing. The kitchen still required installation of cabinets, appliances, hood, back splash, garbage disposal, cabinet facing on the dishwasher and refrigerator. Additionally, drywall repair and window insulation were performed incorrectly by the Respondent's workers.

20. The beam installed in the kitchen by the Respondent's workers was installed incorrectly and was not closed-in properly.

21. The Respondent's workers used incorrect brick around the doors. The bricks were the incorrect size and as a result, the workers used more mortar to fill in the gaps.

22. As of August 30, 2010, the following plumbing was not completed: garbage disposal installation, hot water installation piping, waste drainage, icemaker and dishwasher installation, partial gas piping and range installation.

23. On August 30, 2010, the Claimant obtained an estimate from a licensed contractor, Marafatsos and Sons, to complete the kitchen work. The total estimate to complete the kitchen was \$5,900.00.

24. On September 30, 2010, the Claimant obtained a licensed contractor, D B Plumbing Doctors, LLC, to complete the plumbing work.

25. On October 1, 2010, the Claimant utilized the services of licensed contractor Sanford Kramer to complete additional plumbing work after discovering that the Respondent had not installed radiator lines and plumbing pipes correctly. Additionally, the hot and cold water lines were reversed in the upstairs bathroom and incorrectly installed by the Respondent's workers and had to be corrected.

26. In addition to the \$5,900.00 to complete the kitchen, the following was required to complete the project:

- \$1,669.00 for gas line, bathroom and kitchen plumbing
- \$2253.12 for reinstalling radiators
- \$360.21 to correct the hot and cold water lines
- \$850.00 to secure proper permits

The total additional price to complete the project (not including the \$29,149.00 paid to the Respondent) was \$11,032.33.

27. The wood floors throughout the property were damaged by the Respondent's workers.

The floors were not properly protected and had to be refinished.

28. The Claimant obtained an estimate from Capitol Floors, Inc. for \$4,126.92 to refinish the damaged floors. They did not perform the work. The Claimant completed the work on the floors himself.

DISCUSSION

The Respondent has had an MHIC license at all times relevant to the Claimant's claim. Section 8-405 of the Business Regulation article provides that an owner may recover compensation from the Guaranty Fund "for an actual loss that results from an act or omission by a licensed contractor. . . ." Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2012). Section 8-401 defines "actual loss" as "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).

COMAR 09.08.03.03B governs the calculation of awards from the Fund:

B. Measure of Awards from Guaranty Fund.

(1) The Commission may not award from the Fund any amount for:

- (a) Consequential or punitive damages;
- (b) Personal injury;
- (c) Attorney's fees;
- (d) Court costs; or
- (e) Interest.

(2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(a) 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.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to 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, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurements accordingly.

In this case, in March 2010, the Claimant solicited the Respondent, a licensed contractor, to perform significant renovations to his property. After performing demolition and doing some work on the kitchen and bathrooms the Respondent abandoned the project. The Claimant made numerous requests for the Respondent's agent to complete the work, but the Respondent's project manager refused. The Respondent's project manager failed to do the work as he agreed, and performed inadequate work with regard to the work he completed. The Claimant testified credibly and provided detailed documents and photographs to support the claim. The numerous photographs depicted damage to the floors, incorrect brick and plumbing installation, improper installation of fixtures and damaged fixtures and piping.

During the hearing, Ms. Canales acknowledged that her former husband was the project manager and authorized to act on her behalf. She testified that he is now incarcerated for an unrelated matter and that she had no personal knowledge of the interaction between the project manager and the Claimant. She did not offer any evidence to refute the Claimant's claim.

The Respondent's abandonment and unworkmanlike, inadequate, and incomplete home

improvement entitles the Claimant to reimbursement from the Fund. Subsequent to the abandoning of the contract, the Claimant received estimates from licensed contractors to complete the work of the original contract. The amount to complete the work is \$11,032.33.

In calculating the Claimant's actual loss, I have applied the formula set forth in COMAR 09.08.03.03B(3). As indicated above, the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). The Fund took the position that the Claimants' actual loss was \$11,032.33. This figure does not include the estimate from Capitol Floors, Inc. for \$4,126.92 to refinish the damaged floors. The \$4,126.92 should not be included as "actual loss." The Claimant was very clear that the damage to the floors occurred because the floors were not protected and the Respondent's agents dragged materials over the floors causing scratches and extensive damage. If the damage to the floors constitutes consequential damages, I am not including it in the award. Additionally, the Claimant restored the floors himself.

I calculated the Claimant's actual loss as follows:

Amount paid under original contract	\$ 29,149.00
	+
Reasonable cost to complete work	<u>\$ 11,032.33</u>
	<u>\$ 40,181.33</u>
	-
Original contract price	<u>\$ 30,200.00</u>
	\$ 9,981.33

The Claimant has proved an actual loss of \$9,981.33. The Fund agreed that this is the amount owed to the Claimant.

CONCLUSION OF LAW

I conclude as a matter of law that the Claimant has sustained an actual loss of \$9,981.33 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010);

COMAR 09.08.03.03B(c)(3). I further conclude as a matter of law that the Claimant is entitled to an award of \$9,981.33 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2012).

RECOMMENDED ORDER

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

ORDER that the Claimant be awarded \$9,981.33 from the Fund; 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 at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

June 19, 2013
Date Decision Issued

Jerome Woods, II
Administrative Law Judge

JW/rbs
#128697

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FILE EXHIBIT LIST

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