

IN THE MATTER OF THE CLAIM	*	BEFORE GERALDINE A. KLAUBER,
OF KENNETH HARTMAN,	*	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 FRANCIS COLEMAN	*	
T/A COLEMAN LAURIENZO INC.,	*	OAH No.: DLR-HIC-02-16-30069
RESPONDENT	*	MHIC No.: 15 (90) 369

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On April 21, 2016, Kenneth Hartman (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$40,945.34 in alleged actual losses suffered as a result of a home improvement contract with Francis Coleman, trading as Coleman Laurienzo, Inc. (Respondent).

I held a hearing on February 15, 2017 at the Kensington location of the Maryland Office of Administrative Hearing (OAH). Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).

The Claimant represented himself. Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. 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 Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); 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 that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 - Contract dated March 18, 2014
- Clmt. Ex. 2 - Claimant's accounting of payments and credits with attached invoices and cancelled checks.
- Clmt. Ex. 3 - List of unfinished or unworkmanlike items with attached estimates and cancelled checks
- Clmt. Ex. 4 - Thirty-three pages of photographs of unfinished or unworkmanlike work performed by the Respondent
- Clmt. Ex. 5 - Five pages of Email exchanges between the Claimant and Jill Coleman (Respondent's wife)

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

- Resp. Ex. 1 - Email exchanges between the Respondent and the Claimant, dated November 20, 22 and December 16, 2014

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

Fund Ex. 1 - Notice of Hearing, November 30, 2016

Fund Ex. 2 - Hearing Order, September 26, 2016

Fund Ex. 3 - MHIC Certified Statement of Respondent's Licensing History, December 8, 2016

Fund Ex. 4 - Home Improvement Claim Form, April 18, 2016

Fund Ex. 5 - Letter from MHIC to Respondent, May 11, 2016

Testimony

The Claimant testified in his own behalf and presented the testimony of Kathleen Hartman, his wife.

The Respondent testified in his own behalf and presented the testimony of Jill Coleman, his wife.¹

The Fund presented no 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 license numbers 01-77266 and 05-37666.

2. On March 18, 2014, the Claimant and the Respondent entered into a contract to construct an addition to the Claimant's existing home, remodel the kitchen and bathroom, install a basement Simonton white out-swing egress casement window with screen, replace the porch windows with six Simonton brand double hung windows, replace the porch door with Anderson, refinish existing wood floors, install two sets of

¹ Between 1990 and 2013 Jill Coleman worked for the Respondent on a full-time basis. She was not an employee of the Respondent at times relevant to this matter.

vinyl panel shutters. The contract stated that work would begin on or about April 21, 2014 and would be completed on or about July 31, 2014.

3. The original agreed-upon contract price was \$200,200.00.

4. The Claimant made the following payments totaling \$165,140.00 to the Respondent:

- March 20, 2014 - \$20,020.00
- April 11, 2014 - \$40,040.00
- April 28, 2014 - \$40,040.00
- May 27, 2014 - \$40,040.00
- August 10, 2014 - \$15,000.00
- August 19, 2014 - \$10,000.00

5. The contract contained allowances for these items in the following amounts: cabinets (\$14,000.00); kitchen countertops (\$5,000.00); garbage disposal (\$100.00); vanity (\$850.00); vanity faucet (\$200.00); tub tile (\$400.00); toilet (\$200.00); bath floor tile (\$448.00);

6. The Claimant purchased supplies for wood flooring (\$2,520.81). The flooring supplies were included in the contract.²

7. The allowances in the contract for items ultimately purchased by the Claimant totaled \$21,646.81.

8. The Respondent paid for the following materials and/or performed the following additional work at the following additional cost: Thermatru Door (\$550.00);

² The Claimant sought credit for the following additional allowances: Slider window (\$160.00); soap dish (\$50.00); phone and cable (\$200.00), linen closet and shelving (\$900.00) and door knobs (\$45.98.) The Claimant did not provide proof of payment for the window, soap dish, phone and cable hook-up and the linen closet and shelving. The contract did not specify an allowance for doorknobs. I did not give the Claimant credit for these purchases.

shower niche installation (\$150.00); medicine cabinet installation (\$75.00); upstairs landing railing staining (\$450.00); back landing installation less threshold (\$325.00). The cost of the Respondent's additional work was \$1,550.00.

9. The parties did not execute change orders for the allowances purchased by the Claimant or the additional work performed by the Respondent.

10. On or around September 2014, the plumbing and electric subcontractors approached the Claimant and stated that the Respondent had not paid them for their work. The Claimant paid the subcontractors so that they would finish their work and meet the inspection deadlines. The Claimant paid the electrician subcontractor, Tomato Electric (\$10,892.82), and the plumbing subcontractor, Fernando Tores (\$1,500.00), which totaled \$12,392.00.

11. After applying the credits for the allowances and accounting for the Claimant's compensation paid to the subcontractors, the adjusted contract price was \$167,712.00.

12. On September 15, 2014, the Respondent advised the Claimant that he was out of funds and asked the Claimant for more money. The Claimant refused to give the Respondent any more money until the work was complete.

13. In September 2014, the Claimant filed a complaint with the MHIC.

14. On October 3, 2014, the Claimant met the Respondent's wife, who offered to assist in having corrections made to the work. At that time, the Claimant placed his complaint with the MHIC on hold. At that meeting the Claimant and the Respondent's wife went over the items in the contract that had not been completed.

15. Subsequent to the meeting, the Respondent made some corrections to the roof, master bedroom and grading.

16. In November 2014, the Respondent offered to reimburse the Claimant \$4,530.00 in exchange for a letter of completion and satisfaction of the contract terms. The Claimant declined the Respondent's offer.

17. In December 2014, the Claimant and the Respondent's wife exchanged emails regarding completion of the project. The parties were in disagreement about the cost of the portico. The Respondent informed the Claimant that he could not do any more work on the project.

18. In December 2014, the Claimant reactivated his complaint with the MHIC.

19. Subsequent to December 2014, the Claimant became aware that some of the work performed by the Respondent was done in an unworkmanlike fashion.

20. The Respondent did not properly install the bathtub. The tub pulled away from the tile and was not properly seated or supported. Green board was not installed and there was no insulation behind the tub. John Cassell General Contractor, Inc. (John Cassell) reset the tub and insulated behind the tub at a cost of \$1,465.00.

21. The Respondent erected an exterior rear porch post/column that was four inches out of plumb with the house and not completely mortared. The Claimant hired John Cassell to remove and replace the column at a cost of \$2,440.00.

22. The Respondent improperly installed the trap for the heat side condensate in the HVAC system. The Claimant contracted Wyant Heating and Air Conditioning to fix the system at a cost of \$2,580.00.

23. The kitchen had numerous items in need of repair, including oak floor gap at kitchen entry, nail pops in ceiling, gaps in trim work, incomplete trim work around windows. Additional painting was also needed.

24. The concrete steps extending from enclosed rear porch were not aligned with the porch door.

25. The Claimant obtained a proposal from John Cassell for the kitchen repairs and the rear steps. The total cost was \$6,000.00.

26. The Claimant has not had the kitchen repairs or the rear step work done.

27. The Claimant obtained a proposal from Mark IV, a licensed contractor, to perform the kitchen point-up, prime and paint. The cost of the project was \$2,651.00.

28. The Claimant obtained a proposal from Mark IV to remove and replace the concrete porch steps. The cost of the project was \$4,991.00.

29. The rear porch gutter was not properly attached to the gutter board. Mark IV provided the Claimant with an estimate of \$155.00 to repair the gutter/gutter board. The Claimant has not had the work done yet.

30. The Claimant paid out of pocket \$295.22 for materials to prime and paint second floor bedrooms, repair drywall upstairs and repaint baseboard trim in home.

31. The Respondent failed to perform the following work that was called for in the contract:

- Install five replacement windows in the basement
- Install one basement egress window
- Install a portico
- Install insulation in basement crawl space

32. In or about January 2016, the Claimant paid John Cassell \$5,500.00 to create a new basement egress window.

33. In or about January 2016, the Claimant paid John Cassell \$3,615.00 to install five replacement windows in the basement.

34. The Claimant obtained two estimates for the installation of the portico. John Cassell provided an estimate of \$23,800.00 and Karma Home Designs (Karma) provided an estimate of \$16,900.00. The Claimant has not had the work performed.

35. The Claimant obtained two estimates for the installation of the crawl space insulation. John Cassell provided an estimate of \$650.00 and Karma provided an estimate of \$590.00. The Claimant has not had the work performed.

36. The Claimant sustained an actual loss that exceeded \$20,000.00

DISCUSSION

In this case, the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).³ “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

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) (2015);⁴ *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or

³ As noted above, “COMAR” refers to the Code of Maryland Regulations.

⁴ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

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.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

The Claimant provided testimony, photographs and proposals from other licensed home improvement contractors which established that the Respondent failed to complete the contract and that some of the work performed was not workmanlike. The record established that the Respondent did not properly install the bathtub. The Claimant testified that what was originally believed to be just a caulking issue turned out to be more significant. The Claimant's testimony, photographs and a proposal from John Cassell established that the Respondent had not properly seated or supported the tub and that the back exterior wall behind the tub was not insulated. The Claimant also established that the rear entry landing column installed by the Respondent was out of plumb with the house beam box corner by four inches and needed to be removed and placed in the proper location. The Claimant testified that when the issue was pointed out to the Respondent, he denied that it needed to be moved, but the proposal from John Cassell and the photographs of the column show that the column was installed in the incorrect spot and was not properly mortared. Additionally, when the Claimant hired an HVAC contractor to install the whole house humidifier, he learned that the Respondent improperly installed the trap for the heat side condensate in the HVAC system. The trap was installed for a vertical, rather than the required horizontal, application. The kitchen had numerous items in need of repair, including oak floor gap at kitchen entry, nail pops in ceiling, gaps in trim work, incomplete trim work around windows and painting was needed. Photographs and testimony from the Claimant provided a vivid picture of the installation of concrete steps extending from an enclosed rear porch that were not aligned

with the porch door and left a wide gap between the house and the steps. Additionally, the rear porch gutter was not properly attached to the gutter board.⁵

The Claimant testified that there was mold damage in the crawl space due to the Respondent's improper grading of the rear yard. The Claimant obtained three estimates for grading of the yard and installation of a drainage system. The Claimant had the work done by Mark IV for a price of \$6,201.00. The contract only required that at the completion of the contract the Respondent backfill, rake and seed areas disturbed during construction. The Respondent was not responsible for the installation of a drainage system. I therefore find that the Claimant did not prove that the Respondent was responsible for the grading or any basement water or mold issues associated with the grading.

In addition to these defects in the Respondent's work, the Respondent failed to perform several items that were required under the contract. Specifically, the Respondent failed to construct a front portico, install five replacement windows in the basement, install one basement egress window and install insulation in basement crawl space.

In response to the Claimant's case, the Respondent admitted that he suffered financial difficulties and was unable to complete the contract. He contended, however, that the Claimant received everything that he paid for with the exception of a few punch list items and egress basement window and replacement windows, for which he offered reimbursement. He contended that he performed many items at no expense to the Claimant, including cleaning of ducts, sod installation, additional painting, reworking of gutters and downspouts, and replacement of custom shelves in master bedroom. In addition, the Respondent argued that the construction of

⁵ The Claimant alleged that two existing windows were out of plumb due to the Respondent's installation of new siding and trim work, but other than a speculative statement in a contractor's proposal there was no evidence to establish that the Respondent's work was the cause of the problem.

the portico was a “freebie” and that the Claimant never paid for the portico. In response to the Claimant’s list of unworkmanlike items, the Respondent testified that the steps to the back porch were installed in accordance with the Claimant’s instructions to line up the steps to accommodate the porch light and, therefore, he would replace the steps for an additional expense. He offered no explanation for the bathtub issues or the crawl space.

After considering the evidence, I did not find any of the Respondent’s responses to the issues cited by the Claimant adequate to refute the Claimant’s eligibility for reimbursement from the Fund. I also find that Claimant did not reject a good faith effort by the Respondent to repair or complete the work. The Respondent notified the Claimant in December 2014 that he could not do any more work on the project because he was out of money. The Respondent offered to reimburse the Claimant \$4,530.00 in exchange for a letter of completion and satisfaction of the contract terms. The offer was an inadequate amount to cover the cost of the unfinished work, including the portico. Additionally, after the Respondent left the project, the Claimant discovered numerous instances of poor workmanship by the Respondent. The Respondent’s incomplete and unworkmanlike performance renders the Claimant eligible for reimbursement from the Fund.

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. 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). MHIC’s regulations provide three formulas for measurement of a claimant’s actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case.

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 and complete 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 measurement accordingly.

COMAR 09.08.03.03B(3)(c).

The evidence offered by the Claimant, and which was not rebutted by the Respondent is that the original contract price was \$200,200.00, but the Respondent performed additional work amounting to \$1,550.00, which resulted in a total contract price of \$201,750.00. The Claimant was due credit toward the contract price because of the allowances provided for in the contract that the Claimant ultimately paid. The Claimant also paid the electric and plumbing subcontractors \$12,392.00. Although the parties did not execute any change orders to the contract, I have accepted the figures provided by the Claimant. I have applied the credits due the Claimant and accounted for the Claimant's compensation to the subcontractors and have adjusted the total amount of the contract to \$167,712.00. The Claimant proved that he paid the Respondent \$165,140.00.

The Claimant obtained estimates from licensed contractors, John Cassell, Karma and Mark IV, to complete the contract. Because there was no explanation or opportunity to ask the contractors questions about the differences in the proposal amounts, for those items that the Claimant has obtained proposals but not yet had the work performed, I have used the lower proposal amount in my calculations. Although the Respondent contended that the Claimant was not charged for construction of the portico, that item is specifically included in the contract and there is no documentation to support the Respondent's contention. The Claimant obtained an estimate from John Cassell of \$23,800.00 to construct the portico and estimate of \$16,900.00

from Karma for the same project. I have used the lower figure of \$16,900.00 in my calculations. The lower figure for the insulation of the basement crawl space was \$590.00. The estimate obtained to repair the rear porch steps and gap and perform the various kitchen repairs was \$6,000.00 from John Cassell and \$7,642.00 from Mark IV. I have used the lower figure of \$6,000.00 in my calculations. The Claimant paid John Cassell \$2,440.00 to correct the rear entry column, \$5,500.00 to install the basement egress window, \$3,615.00 to install five basement windows, and \$1,465.00 to fix the bathtub. Mark IV estimated the cost to repair the gutter board at \$155.00. Claimant paid Wyant Heating and Air, Inc. \$730.00 to correct the issue with the furnace trap. The Claimant paid out of pocket \$295.22 to purchase paint for drywall repairs and trim. The total cost to the Claimant to repair, replace or complete is \$32,035.22.

I have calculated Claimant's actual loss by taking the amount paid by the Claimant to the Respondent (\$165,140.00) and added that to the cost to repair or replace the Claimant's work (\$32,035.00) for a total of \$197,175.00; from that figure I have subtracted the original contract price to which I made the adjustments for Respondent's additional work and the credits due to the Claimant (\$167,712.00). The calculations result in a total loss of \$29,463.00. Pursuant to the applicable law, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(1),(5) (2015).

The actual loss computed above exceeds \$20,000.00 by \$ 9,463.00. Accordingly, the Claimant is entitled to reimbursement from the Fund of only a portion of his actual loss, or \$20,000.00. *Id.* § 8-405(e)(1).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

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;⁶ and

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

Signature on File

April 11, 2017
Date Decision Issued

Geraldine A. Klüber
Administrative Law Judge

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⁶ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 22nd day of May, 2017, 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