IN THE MATTER OF THE CLAIM	*	**BEFORE THOMAS G. WELSHKO,**
OF GELANA CHIMDI,	*	**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 MAGOMED VELIEV,	*	
T/A EMN CONSTRUCTION, LLC,	*	**OAH No.: DLR-HIC-02-15-30490**
RESPONDENT	*	**MHIC No.: 15 (90) 457**

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PROPOSED DECISION

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STATEMENT OF THE CASE

On June 19, 2015, Gelana Chimdi (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $15,444.19 in alleged actual losses suffered as a result of a home improvement contract he entered into with Magomed Veliev, t/a EMN Construction, LLC (Respondent).

I held a hearing on April 5, 2016 at the Office of Administrative Hearings' (OAH) Regional Office in Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).[1] The Claimant represented himself. Howard J. Walsh III, Attorney-at-Law, represented the Respondent, who was present. Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

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

2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted three exhibits on behalf of the Claimant, no exhibits on behalf of the Respondent, and four exhibits on behalf of the Fund. (I have attached a complete Exhibit List as an Appendix to this decision.)

[1] Unless otherwise noted, all citations of the Business Regulation Article (Bus. Reg.) from this point forward refer to the 2015 Replacement Volume.

Testimony

The Claimant testified on his own behalf. The Respondent testified on his own behalf. The Fund did not offer any witnesses.

Stipulations

The parties stipulated to the contract terms, and they agreed that original contract price was $6,000.00.

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 4541197 (Registration No. 01-97512). (Fund Ex. 3.)

2. On March 18, 2014, the Claimant entered into a contract (Contract) with the Respondent to perform home improvement work at his Silver Spring, Maryland home. (Stip. Parties; Cl. Ex. 1.)

3. The terms of the Contract called for the Respondent to perform the following work at the Claimant's residence:

First Floor/Living Room

- Remove all carpet and pad in first-floor living room.
- Install crown molding in living room.
- Install engineered flooring in living room, dining room in the hallway (closet too) with shoe molding.
- Remove stairs carpet[,] install stairs riser [sic] and apply stain (color chosen by owner).

- Apply paint, Behr, paint and primer in one (color chosen by owner) in living room, dining room hallway and closets.
- [Install] window and door trim.
- Replace all electrical switches and outlet covers (only covers).

Second Floor

- Replace floor tile in two [bathrooms].
- Apply paint in bathroom.
- Fix all damaged drywall, ceiling, walls, sanded and apply Behr paint.

(Stip. Parties; Cl. Ex. 3.)

4. The original contract price was $6,000.00. The Respondent advised the Claimant that he should replace a door at a cost of $450.00, which the Claimant agreed to do. This change increased the total contract price to $6,450.00. (Stip. Parties; Test. Cl.; Cl. Ex. 2.)

5. The Claimant paid the Respondent $6,350.00 by series of checks. He withheld $100.00 from the Respondent, because the Claimant and the Respondent agreed that the Claimant would buy bathroom tile costing approximately that much, which would offset $100.00 of the Contract price. The Claimant bought bathroom tile at a cost of $116.00. He asked the Respondent to pay him the $16.00 difference, but the Respondent refused. (Test. Cl and Resp.)

6. In early April 2014, the Respondent completed the Contract. Upon completion, the Claimant was dissatisfied with certain aspects of the Respondent's work.

(Test. Cl.; Cl. Ex. 3A – I.)

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); Code of Maryland Regulations (COMAR) 09.08.03.03A(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 (3rd. 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." Bus. Reg. § 8-405(a). *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 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 was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. There is no *prima facie* impediment to the Claimant's recovery from the Fund (being related to or employed by the Respondent; recovering damages from the Respondent in court or through insurance stemming from the same facts that are the basis of his claim; not occupying the property that is the subject of the contract; or owning more than three houses). Bus. Reg. §§ 8-405(f) and 8-408(b)(1).

The Claimant asserts that the Respondent performed home improvement work under the Contract poorly. In support of his assertions, the Claimant offered his own testimony, buttressed by a series of photographs. I found this evidence unconvincing and, therefore, I am recommending that the Fund deny the Claim. I will address the Claimant's allegations, in turn.

"Creaky" and "Shaky" Staircase

After the Respondent finished installing new stair risers, the Claimant states he found his staircase "creaky" and "shaky." (Claimant's Exhibit No. 3B.) The Claimant further contends that there are nail pops in the ceiling directly underneath the staircase where the Respondent installed the new stair risers. (Claimant Exhibit No. 3C.) The Claimant blames these nail pops on the Respondent's poor installation techniques.

The Respondent counters that he did "a good job" on the staircase. He maintains there is nothing wrong with it.

The Fund does not entirely concur with the Respondent that his work was satisfactory; instead, it contends that the Claimant presented insufficient evidence to show that the Respondent's installation of the stair risers was poor.[2] Moreover, with regard to the nail pops, the Fund emphasizes that they appear in the ceiling *underneath* the staircase. The Contract did not call for the Respondent to perform any work on the ceiling beneath the staircase. Therefore, any attendant ceiling damage in that location would be consequential to the Contract. COMAR 09.08.03.03B(1) bars the recovery of consequential damages. Therefore, the Claimant could not recover the cost of ceiling damage repair—even if he had proven that the nail pop damage was the Respondent's responsibility.

[2] The Claimant attempted to show a video on his cellular telephone to demonstrate the creakiness and shakiness of the stairs, but he did not have a copy of that video that I could have preserved for the record. The OAH's Rules of Procedure at COMAR 28.02.01.22C state, "All exhibits marked for identification, whether or not offered in evidence and, if offered, whether or not admitted, shall be retained for purposes of judicial review." Therefore, I could not have complied with this regulatory section, because I had no way to retain a copy of the Claimant's video for review purposes.

I agree with the Fund. To prove that the Respondent installed the stair risers in an "unworkmanlike manner," the Claimant had to show that the Respondent's construction techniques lacked "skill and care."[3] To do so requires more than simply asserting that the staircase was "creaky" or "shaky." In my view, the Claimant needed to offer the opinion of an expert in staircase construction to confirm that the noisy stairs equated to poor workmanship. Here, the Claimant offered no expert testimony, no expert's report or other cogent evidence to demonstrate poor workmanship on the Respondent's part in installing the new stair risers. Additionally, the Fund accurately cited the pertinent regulation that would bar consequential damages. Consequential damages are damages stemming from problems that arise as a consequence of poor performance and not the poor performance itself. *See CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 411 – 13 (2012).

Uneven Crown Molding, Detached Shoe Molding and Non-Flush Switch and Receptacle Covers

The Claimant argues that the crown molding that the Respondent applied is uneven (the corners are unaligned). (Claimant Exhibit Nos. 3E – G.) He also notes some shoe molding became detached. (Claimant's Exhibit No. 3A.) Furthermore, the switch and receptacle covers that the Respondent screwed in are not flush against the wall. (Claimant's Exhibit No. 3H.)

The Respondent maintains that he could not install the crown molding evenly because the Claimant's house is uneven. He further notes that he could easily fix the detached shoe molding by re-nailing it. He avers that he only put back the same switch and receptacle covers that he removed. In this regard, the Respondent is tacitly suggesting that the Claimant is complaining about a condition that existed before he began doing any work.

[3] *Gaybis v. Palm*, 201 Md. 78, 85 (1952) held, "The obligation to perform with skill and care is implied by law and need not be stated in any contract." *Worthington Constr. Co. v Moore*, 266 Md. 19, 22 (1972) reaffirmed that holding. In *K & G Constr. Co. v. Harris*, 223 Md. 305, 314 (1960) the Court of Appeals compared the express standard "workmanlike manner" with the implied standard of performance discussed in *Gaybis*. The *Harris* Court cited *Gaybis* for authority that the "workmanlike-manner" wording was equivalent to the "skill-and-care" wording in *Gaybis*.

The Fund contends that while the crown molding might be uneven and aesthetically unappealing, the Claimant presented no evidence to demonstrate that the Respondent installed it poorly. It argues that the Claimant would have had to call an expert in molding installation techniques to establish that fact. The Fund agrees with the Respondent that all he had to do to fix the detached shoe molding was nail it back in place. As with the crown molding, the Fund further asserts that determining whether the Respondent properly reinstalled the switch and receptacle covers requires an expert opinion.

Again, I agree with the Fund. The Claimant's non-expert testimony is insufficient to demonstrate that installations that are simply aesthetically unattractive, such as the uneven crown molding and protruding switch and receptacle covers, were the result of the Respondent's poor workmanship. Further, I also agree with the Respondent and the Fund that fixing the detached shoe molding is easy; that molding only needs to be nailed back into place.

Split in the Crown Molding

The Claimant contends that a split appearing in the crown molding is evidence of the Respondent's use of substandard installation techniques. (Claimant's Exhibit No. 3I.) The Respondent suggests that this split could have resulted from a water leak or the settling of the Claimant's house. The Fund does not adopt the Respondent's position about this split. It concedes that the split in the crown molding might have been evidence of poor workmanship on the Respondent's part, but avers that the Claimant failed to present evidence to substantiate the cost of repairing it. (I will address the issue of cost of repair in detail below.) I essentially agree with the Respondent and conclude that the Claimant, again, presented insufficient evidence to link the apparent defect of the split in the crown molding with the Respondent's failure to install the crown molding in a workmanlike manner.

Doors Not Closing

During cross-examination by the Fund, the Claimant mentioned that the doors installed by the Respondent did not close properly. The Claimant only offered his testimony in this regard; he did not even offer a photograph showing the allegedly uneven doors. Again, for the reasons already noted, the Claimant has failed to meet his burden to show that the Respondent installed the doors improperly.

Contract Price Dispute

The Claimant also argues that the Respondent cheated him. According to the Claimant, the Respondent had originally agreed to furnish the ceramic bathroom tile for the second floor bathrooms under the terms of the Contract. Instead, he and the Respondent came to an understanding that he (the Claimant) would purchase the ceramic tile in exchange for a Contract price credit of $100.00. Accordingly, the Respondent would reduce the primary Contract price (excluding the new doors) to $5,900.00. The Claimant states he spent $116.00 on the tile, so he asked the Respondent to give him $16.00—the cost in excess of the $100.00 credit that he and the Respondent negotiated. The Claimant notes that the Respondent refused to pay him that $16.00 difference. Not only that, the Respondent still believes the Claimant owes him the supposed credit amount of $100.00.

The Respondent maintains that the Claimant did not buy enough of ceramic tile to use in both bathrooms. According to the Respondent, the Claimant only purchased one box of tile. The Respondent testified that he had to buy four additional boxes of tile to complete the tile installation in the bathrooms. He admitted that he ultimately returned one box of tile to the store where he purchased it. Nevertheless, the Respondent contends that the Claimant's purchase of only one box of tile was inadequate to justify a $100.00 reduction of the Contract price.

The Fund suggests that in the scheme of things, the dispute between the Claimant and the Respondent over the $100.00 for the ceramic tile is not significant. The Contract price would only be relevant if the Claimant sustained an actual loss, which the Fund argues the Claimant did not prove. I agree with the Fund for reasons that I have set out in the "Cost of Repair" section below.

Cost of Repair

Even if I had found that the Claimant was eligible for compensation from the Fund, I would have to determine the amount of the award, if any, to which the Claimant would have been entitled. As touched on earlier, the Fund may not compensate a claimant certain kinds of damages, such as 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 measuring a claimant's actual loss. COMAR 09.08.03.03B(3). The first formula applies to situations where a contractor abandons a job without doing any work. It states, "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." COMAR 09.08.03.03B(3)(a).

The second formula applies to situations where the contractor performs work, or abandons a contract before he completes it, but the claimant is not remediating any defects in the contracted work. That formula states, "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." COMAR 09.08.03.03B(3)(b).

The third formula applies to situations where a contractor has been found to have performed work poorly or has abandoned a contract, and the claimant is seeking another contractor to remediate the problems with the original contractor's work. It states the following:

> 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).

Assuming, for the sake of argument, that the Claimant had shown that the Respondent performed the Contract poorly, his claim remains confusing. On his original claim form, Fund Exhibit No. 4, the Claimant appears to be basing his claim on the third formula, because he cites $15,499.19 as the cost of repair and completion. Yet, at the hearing, he offered no evidence to demonstrate what it would cost to repair or complete those items that he believed the Respondent left in poor condition or incomplete. This kind of evidence is necessary to demonstrate an actual loss using the third formula. At the hearing, the Claimant stated that he wants the Fund to reimburse him everything that he paid to the Respondent. This suggests that he is relying on the first formula. The Claimant cannot seek reimbursement by applying the first formula, though, because the Respondent did not abandon the job before doing any work. Consequently, I conclude that the second formula is the best formula to use in analyzing the merits of the Claim. I glean from the record that the Claimant's theory of recovery is that the Respondent's work has no value and, therefore, the Fund should reimburse him the full amount of what he paid the Respondent under the Contract.

The Claimant, however, is not displeased with every aspect of the Respondent's work. According to his own testimony, the Claimant actually approves of the Respondent's hardwood floor and bathroom tile installations. He also likes his painting work. Therefore, the Claimant essentially concedes that some of the work performed by the Respondent has value. Therefore, I agree with the argument advanced by the Fund that even if the Claimant had shown poor workmanship on the Respondent's part, the Claimant still would have failed to prove that he had sustained an actual loss. This is because, using the second formula, the Claimant could not show the value of those items of the Contact that the Respondent performed satisfactorily versus the absence of value of those items that he allegedly performed poorly.

The Claimant, in his rebuttal closing, contends that the MHIC never made him aware of his need to itemize costs in pursuing his claim against the Fund. I do not accept this contention. The Claimant had the obligation to know what evidence he needed to offer to make a successful Fund claim, and had access to this information from a variety of sources. Many public libraries have copies of the Maryland Annotated Code, including the Business Regulation Article. Code sections also appear on the State of Maryland's website. Similarly, many public libraries have copies of COMAR, which is also online. Moreover, if the Claimant had any questions about what he needed to do to make a successful claim, he could have contacted the MHIC to obtain the necessary information.

For the reasons stated, I conclude the Claimant has not proven an entitlement to reimbursement from the Fund, because he failed to demonstrate poor or incomplete workmanship by the Respondent, and even if he had demonstrated poor or incomplete work by the Respondent, the Claimant failed to show that he sustained an actual loss.

PROPOSED CONCLUSION OF LAW

I conclude as a matter of law that the Claimant did not sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund **DENY** the Claimant's claim in this case; and

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

Signature on File

April 28, 2016
Date Decision Issued

Thomas G. Welshko
Administrative Law Judge

TGW/sw
#161851

PROPOSED ORDER

WHEREFORE, this 3rd day of June, 2016, 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.

I. Jean White

I. Jean White
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION