

I held a hearing on August 6, 2015, at the Office of Administrative Hearings (OAH), 10400 Connecticut Avenue, Suite 208, Kensington, Maryland 20895. John Hart, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimant appeared and represented himself. Karina Tsymbal of AdAstra served as the Russian language interpreter for the hearing.¹ The Respondent appeared and represented himself.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, 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; COMAR 09.08.02; 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, how much is the Claimant entitled to receive from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits²

I admitted exhibits on behalf of the Claimant as follows:

- Cl. Ex. 1: Construction contract, dated July 1, 2014
- Cl. Ex. 2: Estimate – Repair of Pocket Door, from Shair Home Improvement, Inc., dated January 18, 2015
- Cl. Ex. 3: Photographs (4) of pocket doors
- Cl. Ex. 4: Agreement from Plumbtastic Plumbing, dated January 21, 2015
- Cl. Ex. 5: Photographs (8) of bathroom vanity/cabinet
- Cl. Ex. 6: Billing invoice from Décor Planet, emailed and dated May 29, 2014
- Cl. Ex. 7: Claimant's drawing/diagram of bathroom cabinet, sink, vanity and mirror

¹ Both the Claimant and Respondent's first language was Russian; they each used the interpreter as needed.

² The Claimant presented a video of constructed pocket doors, which was viewed by all of the parties and me. The video was not in a portable format so it was not admitted into evidence.

- Cl. Ex. 8: Photographs (3) of bathtub construction and shower
- Cl. Ex. 9: Photograph (1) of water heater and ventilation pipe
- Cl. Ex. 10: Photographs (15) of bathroom and shower floor area

The Claimant presented a video of constructed pocket doors³, which was viewed by all of the parties and me.

I admitted one exhibit on behalf of the Respondent as follows:

Resp. Ex. 1: Letter from the Respondent to MHIC, dated November 14, 2014

I admitted exhibits on behalf of the Fund as follows:

- GF Ex. 1: Notice of Hearing, dated June 10, 2015
- GF Ex. 2: MHIC Hearing Order, dated March 12, 2015
- GF Ex. 3: Respondent's License History, as of August 5, 2015
- GF Ex. 4: MHIC Home Improvement Claim Form, dated January 28, 2015 and received by MHIC on February 11, 2015
- GF Ex. 5: Letter from MHIC to the Respondent, dated February 12, 2015

Testimony

The Claimant testified on his own behalf. His wife, Immanuela Vishkin, testified as his witness.

The Respondent testified on his own behalf and did not produce other witnesses.

There was no testimony presented on behalf of the Fund.

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 contractor's license number 01-89298. There was no corporate registration number as he was listed as a sole proprietor.
2. On July 1, 2014, the Claimant and Respondent signed a contract which provided that the Respondent would do home improvement work on the home located at Three Kettle

³ Pocket doors open into and close from a constructed "pocket" of a wall.

Pond Court, Rockville, Maryland, 20854, that the Claimant shares with his wife. Specifically, the Claimant hired the Respondent to construct and renovate a master bedroom, master bathroom and laundry room. The contract required the Respondent to do home improvement work as follows:

Master Bedroom Renovation:

1. Build walls in master bedroom; make hallway (according to blue prints) with wardrobes/closets all around as needed
2. Install electrical receptacles, switches and lights where necessary
3. Install drywall, compound and painting of whole bedroom

Master Bathroom Renovation:

1. Demolition of all walls and floor in master bathroom (left gust frame and sub floor)
2. Install bathtub
3. Install tub from the concrete
4. Install faucets in the shower
5. Install cement board and drywall
6. Install new ventilation fan
7. Install new tile on the floor and walls
8. Install toilet in designated place
9. Install vanities and sinks
10. Paint ceiling and walls
11. Install electrical receptacles, switches and lights where necessary

Laundry Renovation:

1. Demolition of walls in closet
2. Make new frame
3. Install drain and water lines for laundry
4. Install electrical receptacles, switches and lights where necessary
5. Install gas and hot water
6. Install washer and dryer
7. Install tiles on the floor

3. The total contract price was \$8,500.00 for labor only. The work was to be completed by August 29, 2014. The contract required the Claimant to pay a down payment of \$2,550.00 and pay \$3,400.00 upon the Respondent completing installation of the tile in the

bathroom. The balance of \$2,550.00 was to be paid upon completion of the total project.

Construction materials were not included in the contract price.

4. The Claimant paid the Respondent \$5,950.00 toward the total amount due of \$8,500.00.⁴

5. The Respondent began work on July 7, 2014 and continued working through October 24, 2014.

6. On October 24, 2014, the Claimant told the Respondent to clean up his tools and materials and leave the house key.

7. The Respondent returned the key to the Claimant's wife.

8. The Claimant and the Respondent exchanged texts and emails in an attempt to reschedule a time for the Respondent to return to the home to complete the contract, but they were unable to decide on a date. The Respondent did not abandon the home improvement project after October 24, 2014.

9. The July 1, 2014 contracted work that was and was not completed as of October 24, 2014, is listed as follows:

Master Bedroom:

- | | | |
|-----|-------------|---|
| (1) | Incomplete: | Build walls in master bedroom, make hallway with wardrobes/closets all around as needed |
| (2) | Complete | |
| (3) | Complete | |

Master Bath

- | | |
|-----|----------|
| (1) | Complete |
| (2) | Complete |
| (3) | Complete |
| (4) | Complete |

⁴ The Claimant also reimbursed the Respondent the sum of \$7,000.00 for the purchase of construction materials.

- | | | |
|------|-------------|---|
| (5) | Incomplete: | Install cement board and drywall |
| (6) | Complete | |
| (7) | Incomplete: | Install new tile on the floor and walls |
| (8) | Complete | |
| (9) | Complete | |
| (10) | Incomplete: | Painting ceiling and walls |
| (11) | Complete | |

Laundry

- | | | |
|-----|----------------|----------------------------|
| (1) | No need to do: | Demolition walls in closet |
| (2) | Incomplete: | Make new frame |
| (3) | Complete | |
| (4) | Complete | |
| (5) | Complete | |
| (6) | Complete | |
| (7) | Incomplete: | Install tiles on floor |

10. On December 3, 2014, the Claimant paid to NB Construction the sum of \$2,225.00 to complete work not completed by the Respondent.

DISCUSSION

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available pool of money from which homeowners could seek relief for actual losses sustained because of an unworkmanlike, inadequate, or incomplete home improvement performed by a licensed home improvement contractor. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2015). Under this statutory scheme, licensed contractors are assessed fees which subsidize the Fund. Homeowners who sustain losses by the actions of licensed contractors may seek reimbursement for their “actual losses” from this pool of money, subject to a maximum of the lesser of \$20,000.00 or the amount paid by or on behalf of the claimant to the contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5). A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-

405(a). When the Fund reimburses a homeowner as a result of an actual loss caused by a licensed contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she reimburses the Fund in full with annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-411.

Recovery against the Fund is based on “actual loss” as defined by statute and regulation. “[A]ctual 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. “By employing the word ‘means,’ as opposed to ‘includes,’ the legislature intended to limit the scope of ‘actual loss’ to the items listed in section 8-401.” *Brzowski v. Md. Home Improvement Comm’n*, 114 Md. App. 615, 629 (1997). The Fund may only compensate [claimants] for actual losses incurred as a result of misconduct by a licensed contractor. COMAR 09.08.03.03B(2). At a hearing on a claim, the claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1).

First, there is no dispute that the Respondent held a valid contractor’s license in 2014 when he entered into the contract with the Claimant. Second, there is also no dispute that the Claimant is an owner and that there is no procedural impediment barring him from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(f). The next issue is whether the Respondent abandoned the contract or, if not, whether he made good faith efforts to complete the contract. A claim may be denied if the Claimant unreasonably rejects good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d).

At the hearing, both the Claimant and the Respondent provided testimony that was not relevant to determining if the Claimant suffered an actual loss due to an incomplete home

improvement by the Respondent. For instance, there was testimony regarding the condition of the pocket doors after the Respondent repainted them at the Claimant and his wife's request, and testimony regarding some work that they believed was substandard. The Respondent did not dispute that some items under the contract were not completed, but that is not the end of the inquiry. The issue here is where the Claimant has proved an actual loss. Much of the testimony concerning the pocket doors, the master bath and vanity, understandably, are important matters to the Claimant, however, for the reasons that follow, that information is not necessary for me decide this case.

The Claimant suggested that the Respondent abandoned the job after October 24, 2014, which the Respondent denied. The Respondent testified that the Claimant told him on October 24, 2014 to clean up his belongings and leave the house key. The Respondent told the Claimant that he would like to return Saturday October 25, 2014, to finish the work. According to the Respondent, the Claimant told him to leave the garage door opener and the key. The Respondent made an effort via text message to again convince the Claimant to allow him to work on Saturday. The Claimant responded via email Sunday, October 26, 2014 and told the Respondent that if he did not return to complete the home improvement by 9:00 a.m., Monday, October 27, 2014, the Claimant would continue the job with a different contractor. The Respondent could not work on Monday due to another commitment and thus, did not return to complete the contract.

I find the Respondent credible when he testified that he wanted to complete the work pursuant to the contract. His testimony was consistent with the testimony of the Claimant regarding the communication attempted between each of them. The Claimant did not deny that he communicated with the Respondent via email about returning to the home to work on Monday.

The communication between the parties resulted in the Claimant demanding the Respondent leave the premise and requiring his return on Monday, or forever lose the job opportunity. From these facts, I am satisfied that the Respondent did not abandon the contract. On the other hand, I do not deny the claim for the reasons of an unreasonable rejection of good faith efforts on the part of the Claimant to resolve the claim. The parties communicated, but could not agree to a mutual time to have the work completed by the Respondent.

Although I do not deny the claim for failure of good faith efforts to resolve the claim, I do find that the Respondent did not complete the home improvement work which he agreed to do pursuant to the July 1, 2014 contract. The Claimant paid the Respondent \$5,950.00 toward the total contract price of \$8,500.00. The Respondent did most of the work for the Claimant, but did not do it all because of the additional projects the Claimant asked him to do. The Respondent should have completed the work he was contractually bound to do before he began additional projects. Before the contracted work could be completed, the Claimant hired a new contractor to complete the work.

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 offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3) sets forth the various formulas for determining an "actual loss" as follows:

- (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 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)(a) does not apply to the facts, as the Respondent did the majority of the work pursuant to the July 1, 2014 contract. The photographs submitted into evidence clearly show the project in stages of construction as well as completion. COMAR 09.08.03.03B(3)(b) does not apply to the facts since the Claimant did solicit another contractor to complete the contract. I will thus evaluate the claim under COMAR 09.08.03.03B(3)(c).

The evidence shows that the Claimant hired a new contractor, NB Construction, and paid NB Construction \$2,225.00 to complete the work. Thus, the following calculations apply:

\$ 5,950.00	Payments made to the Respondent by Claimant
+\$ <u>2,225.00</u>	Cost to complete the work paid to NB Construction
= \$ 8,175.00	(Expenditure Subtotal)
< \$ <u>8,500.00</u> >	Less the original contract price
\$ 00.00	Actual Loss

The Claimant did not sustain an "actual loss." His total expenditure of \$8,175.00 is less than the original contract price of \$8,500.00, thus, there is no proof of actual loss.

The Fund recommended that the claim be denied due to the failure of the Claimant to prove actual loss. I agree. I find that the Claimant has not sustained his burden of demonstrating an actual loss and thus, is not entitled to reimbursement from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual loss as a result of any acts and omissions of the Respondent. Md. Code Ann., Bus. Reg. § 8-401 (2015); Md. Code Ann., Bus. Reg. § 8-405(a) (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

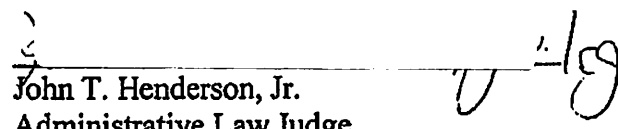
I PROPOSE that the Maryland Home Improvement Commission:

ORDER that the Claimant's Claim of an actual loss be DENIED.

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

Signature on File

October 27, 2015
Date Decision Issued


John T. Henderson, Jr.
Administrative Law Judge

JTH/cj
#158902