

**IN THE MATTER OF THE CLAIM  
OF JACK ROZMARYN,  
CLAIMANT  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF LENIN FAUSTO GARCIA,  
T/A PRESTIGE RESTORATION SERVICES,  
RESPONDENT**

**\* BEFORE DAVID HOFSTETTER,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
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\* OAH No.: DLR-HIC-02-15-24743  
\* MHIC No.: 15 (90) 828  
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**PROPOSED DECISION**

STATEMENT OF THE CASE  
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PROPOSED CONCLUSION OF LAW  
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**STATEMENT OF THE CASE**

On May 21, 2015, Jack Rozmaryn (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of alleged actual losses suffered as a result of a home improvement contract with Lenin Fausto Garcia, t/a Prestige Restoration Services (Respondent).

I held a hearing on November 16, 2015 at the Office of Administrative Hearings, 10400 Connecticut Avenue, Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e)

(2015).<sup>1</sup> The Claimant represented himself. The Respondent represented himself. Hope Sachs, 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 Office of Administrative Hearings (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 the following exhibits on the behalf of the Claimant:

- Cl. Ex. 1 Contract, dated May 1, 2013
- Cl. Ex. 2 Cancelled checks, dated May 10, 2013, May 24, 2013, June 3, 2013; bank statements of Claimant for periods of April 19, 2013 – May 20, 2013 and May 21, 2013 to June 18, 2013
- Cl. Ex. 3 Inspection report by GML General Contractors (GML), undated
- Cl. Ex. 4 Proposal from GML, dated December 30, 2014
- Cl. Ex. 5 Bank statement of Claimant, for period including May 6, 2013
- Cl. Ex. 6 Thirty-three photographs, undated

The Respondent did not offer any exhibits into evidence.

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<sup>1</sup> Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 Notice of Hearing, dated July 28, 2015; Hearing Order, dated July 8, 2015
- Fund Ex. 2 Licensing history, dated November 13, 2015
- Fund Ex. 3 Letter to the Respondent from MHIC, dated May 28, 2015; Home Improvement Claim Form, dated received at MHIC, May 21, 2015, with attachments

Testimony

The Claimant testified and presented the testimony of Moises Alfaro, owner and manager of GML. Mr. Alfaro was accepted as an expert in the construction and repair of tile floors.

The Respondent testified and called no other 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 home improvement contractor licensed by the MHIC.
2. On May 1, 2013, the Claimant and the Respondent entered into a contract (Contract) to install new flooring in the Claimant's foyer, kitchen, breakfast room, laundry room, powder room, and a closet.
3. Specifically, the Respondent contracted to remove the existing flooring and to replace it with sub-flooring and ceramic tile. The Respondent also contracted to grout as appropriate and to provide one coat of sealer to the new ceramic tile and grout.
4. The Contract provided that the ceramic tile and the grout would be supplied by the Claimant at his expense.
5. The total contract price was \$3,400.00.
6. The Respondent began work on the project on or about May 10, 2013.
7. The Claimant paid the Respondent a total of \$3,400.00 under the Contract.

8. The Claimant purchased and supplied the Respondent with the ceramic tile and grout for the project.
9. The Respondent completed the project by the end of May 2013.
10. In or before September 2014, the Claimant began to notice various problems with the ceramic tile floor installed by the Claimant. Those problems included:
  - \* Many of the tiles were loose and/or cracked
  - \* Many of the tiles produced a clicking sound when walked on
  - \* The grout was missing in places, and in other places was stained and/or coming away from the flooring
  - \* The grout was not properly sealed
  - \* At various points where the tile abuts a wall or corner, the tile was not cut to the proper dimensions and large gaps were filled in with grout
11. The Claimant called the Respondent several times in September 2014 and left messages for the Respondent, but the Respondent did not return his calls.
12. The Claimant spoke with the Respondent in October 2014 and the Respondent told him he or one of his employees would come out to look at the floor. Shortly thereafter, the Respondent told the Claimant that neither he nor any of his employees would be available to look at the floor until after January 1, 2015.
13. In December 2014, the Claimant hired GML, a licensed home improvement contractor, to inspect the Respondent's work. Moises Alfaro, owner and manager of GML, performed an inspection of the work and submitted a Proposal to the Claimant on December 30, 2014. The Proposal stated that the cost to tear out the Respondent's work and properly install a ceramic floor as called for in the Contract would be \$5,855.00, with the Claimant supplying the tile and grout.

14. Most of the problems with the flooring resulted from improper installation of the sub-flooring by the Respondent. The sub-flooring was installed without required screws or other fasteners at the appropriate locations and intervals. As a result of the improper installation of the sub-flooring, it warped and buckled, resulting in cracks, looseness, and other problems with the ceramic tiles and grout.
15. At some point after January 1, 2015, the Respondent came to the Claimant's home and inspected the work he had performed under the Contract. The Claimant told him that the whole floor needed to be replaced. The Respondent at first agreed to replace only one tile, but later in the conversation agreed to replace a few tiles that were "loose."
16. The Respondent never performed any further work on the floors after the initial completion of the job in or around May 2013.
17. The problems with the Respondent's work cannot be corrected by replacing certain tiles; the entire installation must be ripped out and begun over again from the beginning.
18. The cost to tear out the Respondent's work and properly complete the work is \$5,855.00. This price is based on the Claimant supplying tiles and grout at his own expense.
19. As of the time of the hearing in this matter, the Claimant had not hired GML or any other contractor to replace or correct the work performed by the Respondent under the Contract.

### DISCUSSION

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 proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant.<sup>2</sup> The Respondent performed work under the contract, but after a little more than a year, substantial problems with the flooring appeared. Those problems, according to the Claimant, included cracked tiles, loose tiles, cracked and discolored grout, and clicking sounds from the tile when trod upon. In addition, there were other problems, such as incorrectly cut tiles, which would have been apparent from the time of the completion of the work. I found the Claimant credible, based on his demeanor, the consistency of his testimony, and the corroboration of his testimony supplied by the photographs in evidence (Cl. Ex. 6) and the testimony of his expert.

As for the testimony of Mr. Alfaro, the Claimant's expert, he testified that he observed the same problems described by the Claimant and offered his opinion as to the cause of the problems. He testified that his inspection (which involved removing a number of tiles to reveal the sub-flooring) established that the sub-flooring had been incorrectly installed. He testified that the industry practice of "glue and screw" as applied to the plywood sub-flooring required that the plywood be screwed into the substrata at six-inch intervals. He testified that this was not done by the Respondent and that, as a result, the sub-flooring warped and buckled over several months, resulting in the cracking, clicking, and looseness problems. He also testified that many of the tiles which abut the walls or corners were cut in an incompetent way, resulting in large gaps which the Respondent then improperly filled with grout. Mr. Alfaro also testified that it was his expert opinion that the problems arising from the Respondent's work could not be corrected by simply replacing certain tiles. Because the main source of the problems is the

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<sup>2</sup> The Contract, Cl. Ex. 1, is on a form with the printed title, "Estimate." It is dated May 1, 2013 and details the work to be performed and the Contract price. The document is not signed by either party, but both parties agreed on the record that Cl. Ex. 1 is the document which they considered to be the contract in force between them. Therefore, I will treat it as such, despite the lack of signatures. The Fund raised no objection to this approach.

improperly installed sub-flooring, he explained, the whole job must be ripped out and a new contractor must start from scratch. I found Mr. Alfaro to be a credible expert witness based on his demeanor, his years of experience in the field, and his comprehensive knowledge of the particulars of ceramic floor installation.

The Respondent testified that his work was done properly. When asked on cross-examination what he believed accounted for the problems with the floor, he stated that he did not know. At various points in his testimony, however, he testified that “maybe” either the tile or the grout supplied by the Claimant was defective. He testified that the tile selected by the Claimant for installation was thinner than the existing tile and that perhaps that had something do with the problems. When asked if he had ever seen defective tile or grout in his professional experience, he responded that he had not. When asked how thinner tile could account for the problems, he testified that “it shouldn’t make much difference or else they wouldn’t sell it.” Regarding any issues regarding the installation of the plywood sub-flooring, the Respondent testified that it had been properly installed and that although he did not use screws every six inches as the Claimant’s expert testified was necessary, “we did a lot.” Regarding incorrectly cut tiles creating gaps improperly filled with grout, he admitted upon looking at the photographs in Cl. Ex. 6, that some tiles were cut and installed incorrectly.

The Respondent did not specifically deny the allegations of the Claimant or rebut the analysis presented by the Claimant’s expert. He merely stated that he thought that, in most particulars, his work was proper and that he didn’t know what caused the problems. His equivocal testimony that the problems were “maybe” caused by some unknown and unexplained defect in the tile or grout is not persuasive. I do not find his testimony to be credible.

Based on the evidence before me, including the testimony of the Claimant’s expert, the Respondent’s performance under the Contract was clearly unworkmanlike. I therefore find that

the Claimant is eligible for compensation 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.

(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)(c).

The Claimant's actual loss is calculated under the formula as follows:

Amount paid under original contract	\$3,400.00
Amount to be paid to correct	<u>+\$5,855.00</u>
	\$9,255.00
Original contract price	<u>-\$3,400.00</u>
Actual loss	\$5,855.00

Pursuant to the Business Regulation Article, 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. Bus. Reg. § 8-405 (e)(1), (5). In other words, a claimant cannot recover more than the amount the claimant paid to the contractor. In this case, the Claimant paid \$3,400.00 to the Respondent. Although this amount is less than the amount of his actual loss as set forth above,



the Claimant's reimbursement is limited to reimbursement of \$3,400.00.<sup>3</sup> Bus. Reg. § 8-405 (e)(5).

**PROPOSED CONCLUSION OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$3,400.00 as a result of the Respondent's acts and omissions. 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 award the Claimant \$3,400.00; 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 at least ten percent (10%) as set by the Maryland Home Improvement Commission;<sup>4</sup> and

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

**Signature on File**

February 8, 2016  
Date Decision Mailed

\_\_\_\_\_  
David Horstetter  
Administrative Law Judge

DH/cj  
#159337

<sup>3</sup> The Claimant presented evidence of his cost to purchase the ceramic tile the Respondent used on the job. Cl. Ex. 5. This cost, however, was specifically excluded from the Contract, which provided that the Claimant would supply the tile and grout for the job at his own expense. Although the Claimant must unfortunately now bear that cost again to have the job done properly by another contractor, the statute does not provide a basis for reimbursement for the cost of tile and grout given that it was not part of the original Contract.

<sup>4</sup> See Md. Code Ann., Bus. Reg. § 8-410(a) (2015); COMAR 09.08.01.20.