

IN THE MATTER OF THE CLAIM
 OF NAFIZ SISMAN,
 CLAIMANT
 AGAINST THE MARYLAND HOME
 IMPROVEMENT GUARANTY FUND
 FOR THE ALLEGED ACTS OR
 OMISSIONS OF JAMES J. MARTIN,
 T/A PROMPT RESTORATION, INC.,
 RESPONDENT

* BEFORE DAVID HOFSTETTER,
 * AN ADMINISTRATIVE LAW JUDGE
 * OF THE MARYLAND OFFICE
 * OF ADMINISTRATIVE HEARINGS
 * OAH No.: DLR-HIC-02-16-29329
 * MHIC No.: 16 (90) 1231
 *
 *
 *

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On June 6, 2016, Nafiz Sisman (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$166,536.81 in alleged actual losses suffered as a result of a home improvement contract with James J. Martin, trading as Prompt Restoration, Inc. (Respondent).

I held a hearing on July 19, 2017 at the Office of Administrative Hearings (OAH)– Kensington, 10400 Connecticut Avenue, Suite 208, Kensington, Maryland. Md. Code Ann.,

Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ Justin McNerny, Esquire, represented the Claimant.² Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting twenty minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.³

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, 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 & Supp. 2017); 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 – Durable Power of Attorney, dated June 23, 2014

¹ The hearing was originally scheduled for January 24, 2017. On January 24, 2017, the Fund requested to postpone the hearing to allow the Claimant to retain counsel. The postponement request was granted and the hearing was rescheduled for April 14, 2017. On or about April 6, 2017, the Claimant requested a postponement because he was overseas and in poor health. The postponement request was granted and the hearing was rescheduled for July 19, 2017.

² The Claimant was not present at the hearing because he was overseas and in poor health. On June 19, 2017, the Claimant filed a Motion to Waive Presence of Petitioner [sic], reciting facts regarding the Claimant's overseas residence and his health. The motion requested that the Claimant's adult son and power of attorney, Serif Sisman, be permitted participate in the hearing in the Claimant's stead. Neither the Respondent nor the Fund responded to this motion and I granted it prior to the hearing. At the hearing, Serif Sisman was present and provided a Power of Attorney authorizing him to manage the Claimant's affairs. Clmt. Ex. 1.

³ Notice of the hearing was mailed to the Respondent at the address of record by first class mail and by certified mail on May 12, 2017, COMAR 09.08.03.03A(2). The certified mail copy was returned to OAH on June 9, 2017 as unclaimed. The first class mail copy of the notice was not returned. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter.

Clmt. Ex. 2 – Agreement between Owner and Contractor, dated June 2, 2015

Clmt. Ex. 3 – Check, dated May 20, 2015

Clmt. Ex. 4 – Invoice, dated June 15, 2015

Clmt. Ex. 5 – Email chain, ending February 3, 2016

Clmt. Ex. 6 – Estimate, printed June 2, 2016

Clmt. Ex. 7 – Color photograph, undated

Clmt. Ex. 8 – Color photograph, undated

Clmt. Ex. 9 – Color photograph, undated

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 – Hearing Order, dated September 21, 2016

Fund Ex. 2 – Notice of Hearing, dated May 23, 2017

Fund Ex. 3 – Notice of Hearing, dated May 12, 2017

Fund Ex. 4 – Letter from the OAH, dated June 13, 2017, with the following attachments:

- Notice of Hearing, dated May 12, 2017
- Returned envelope, received June 12, 2017
- Return receipt, dated July 19, 2017

Fund Ex. 5 – Letter from the MHIC to the Respondent, dated July 7, 2016, with the following attachments:

- Home Improvement Claim Form, dated June 3, 2016
- Occupational / Professional License History, printed July 17, 2017
- Memorandum, dated March 23, 2017

No exhibits were offered on behalf of the Respondent.

Testimony

Serif Sisman, the Claimant's son, testified on behalf of the Claimant.

The Fund did not present any testimony.

The Respondent was not present, and did not offer any testimony.

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 100702.
2. At all times relevant, the Claimant resided at and owned the home at 7604 Dwight Drive, Kensington, Maryland.
3. On January 14, 2015, a fire occurred at the Claimant's home, causing extensive damage in which the house was effectively gutted.
4. On June 4, 2015, the Claimant and the Respondent entered into a contract (Contract) to restore and rebuild the Claimant's fire-damaged home.
5. The Contract provided that the Respondent would fully reconstruct the interior of the Claimant's home, including, among other things: removal of debris from the fire; smoke damage mitigation; electrical work; plumbing; framing; constructing walls and ceilings; hanging windows; painting; flooring; and bathroom and kitchen reconstruction.
6. The Contract stated that work would begin on June 2, 2015 and would be completed within six months.
7. The agreed-upon contract price was \$220,220.54.
8. The Contract provided that the contract price would be paid in a series of four draws tied to the progress of his work.
9. Shortly after the fire, damage to the home was assessed by the Claimant's homeowner insurer, Travelers Insurance (Travelers).
10. In adjusting his claim, the Claimant hired the private insurance adjusting firm of Goodman, Gable, and Gould, Adjusters International (Goodman).

11. On May 20, 2015, Travelers issued a check to the Claimant and Goodman for \$166,536.81 for the Claimant's losses in the fire.
12. The Claimant and Goodman endorsed the check and Goodman deposited it in an account at the Bank of America (BOA) for the purpose of paying the series of draws to the Respondent for work performed under the Contract.
13. At some point in June 2015, BOA, without authorization from the Claimant or Goodman, issued to the Respondent a check for the full amount of the Travelers payment, \$166,536.81.
14. In mid-June, the Respondent removed approximately two dumpsters of debris from the site.
15. Other than the removal of approximately two dumpsters of debris from the site, the Respondent never performed any other work under the Contract.
16. Beginning after the removal of two dumpsters of debris in June 2015, the Claimant repeatedly attempted to contact the Respondent about completing the work under the Contract.
17. The Respondent was generally unresponsive to the Claimant's communications but in the fall of 2015, the Respondent told the Claimant that he would be unable to complete the work and that he was declaring bankruptcy.
18. The Respondent told the Claimant that he (the Respondent) would attempt to pay back the funds he had received under the Contract, minus a charge for the debris removal performed.
19. The Respondent never returned any funds to the Claimant.
20. A reasonable charge for removing two dumpsters of debris is \$1,500.00.

21. Because of the unauthorized transfer of the insurance payment to the Respondent and the Respondent's failure to perform substantial work under the Contract, the Respondent was financially unable to hire another contractor to complete the work.

22. As a result of the Claimant's financial inability to hire another contractor, the Claimant intends to have the house torn down.

23. The Claimant's actual loss is \$165,036.81.

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). "[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 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.

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

In this case, none of the important facts are in dispute or subject to question. The Claimant suffered a devastating fire at his home on January 14, 2015. His homeowner's insurance company, Travelers, determined that the covered amount of the loss was \$166,536.81 and, on May 20, 2015, issued a check in that amount to the Claimant and his private adjuster. Clmt. Ex. 3. The check was deposited in a BOA account for the purpose of disbursing the funds to the Respondent in accordance with the draw schedule established by the Contract. Clmt. Ex. 2. For unknown reasons, BOA improperly and without authorization, issued funds in the full amount of the check to the Respondent sometime in June 2015. Testimony of Sisman. It is therefore clear that the Respondent received the full amount of the Travelers' check as payment under the Contract. Moreover, despite statements of intent to the contrary by the Respondent, he never performed any more work or returned any funds to the Claimant.

It is similarly clear that the Respondent performed almost no work under the Contract. The Respondent's performance was therefore inadequate and incomplete. As a result, 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.

"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).

In this case, the Respondent did at least some work pursuant to the contract (removing debris). Moreover, the house is likely to be torn down and, therefore, according to the Claimant's son, the Claimant is not soliciting a contractor to complete the work specified in the Contract. Using the formula set forth above, the only remaining question is the value of the work actually performed, i.e., the removal of two dumpsters of debris. Mr. Sisman testified that in the fall of 2015, while discussing reimbursement with the Respondent, the Respondent suggested that \$1,500.00 was a reasonable fee for filling and removing two dumpsters of debris. At the hearing, the Claimant adopted this estimate and the Fund agreed that the estimate was reasonable. As a result, I conclude that \$1,500.00 is indeed a reasonable cost for the minimal work performed by the Respondent.

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

| | |
|---|---------------------|
| Amount paid under the contract | \$166,536.81 |
| Value of materials or services provided | <u>-\$ 1,500.00</u> |
| Actual loss | \$165,036.81 |

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). The actual loss computed above of \$165,036.81, of course, exceeds \$20,000.00. Accordingly, the Claimant is entitled to reimbursement from the Fund of the maximum allowable amount of \$20,000.00. *Id.* § 8-405(e)(1).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss 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)(b). The amount of that loss is \$165,036.81. *Id.*

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00.

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

Signature on File

October 17, 2017
Date Decision Issued

David Hofstetter
Administrative Law Judge

DH/sw
170264

PROPOSED ORDER

WHEREFORE, this 3rd day of November, 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.

J. Jean White

***I. Jean White
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION