

IN THE MATTER OF THE CLAIM	* BEFORE JOY L. PHILLIPS,
OF DAVID AND PAMELA TYSON,	* AN ADMINISTRATIVE LAW JUDGE.
CLAIMANTS	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF JAMES J. MARTIN,	*
T/A PROMPT RESTORATION, INC.	* OAH No.: DLR-HIC-02-17-40126
RESPONDENT	* MHIC No.: 17 (90) 1046

* * * * *

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 July 26, 2017, David and Pamela Tyson (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$11,376.00 in actual losses allegedly suffered as a result of a home improvement contract with James J. Martin, trading as Prompt Restoration, Inc. (Respondent).

I held a hearing on February 14, 2018 at the Prince George’s County Government Center in Largo, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). The Claimants represented themselves. Shara Hendler, Assistant Attorney General, assisted by Andrew J. Brouwer, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department),

represented the Fund. After waiting fifteen 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.¹

The contested case provisions of the Administrative Procedure Act (APA), the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings 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 Claimants 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 pre-numbered exhibits on the Claimants' behalf unless otherwise noted:²

- Clmt. Ex. 1 - Example of Change Order from the Respondent, date assigned, June 8, 2014, and Original Estimate from the Respondent, November 6, 2014
- Clmt. Ex. 2 - Photographs 1 through 16
- Clmt. Ex. 6 - Not admitted
- Clmt. Ex. 7 - Estimate from Michael & Son Services, October 24, 2017
- Clmt. Ex. 8 - Proposal from Michael & Son Services, October 23, 2017
- Clmt. Ex. 10 - Floor plan of the Claimants' home, June 26, 2014
- Clmt. Ex. 11 - Not admitted
- Clmt. Ex. 12 - Estimate from Michael & Son Services, October 20, 2017

¹ The Office of Administrative Hearings (OAH) mailed a notice of hearing to the Respondent at his address of record by regular and certified mail on January 2, 2018. It sent another notice of hearing to the Respondent at a new address on January 24, 2018, COMAR 09.08.03.03A(2). Neither the first nor second notices were returned as unclaimed/undeliverable. 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 notices the OAH sent to the Respondent were proper and proceeded to hear the captioned matter.

² Exhibits that are not listed were not offered into evidence.

I admitted no exhibits on the Respondent's behalf.

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 - Hearing Order, December 11, 2017
- GF Ex. 2 - Notices of Hearing, January 2, 2018 and January 24, 2018, with Affidavit of Kevin Niebuhr, February 13, 2018
- GF Ex. 3 - Home Improvement Claim Form, July 21, 2017, received by the Fund July 26, 2017
- GF Ex. 4 - Licensing and Registration Inquiry, printed February 12, 2018

Testimony

The Claimants testified in their own behalf.

The Respondent presented no testimony.

The Fund presented no 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 4770628.
2. On June 1, 2014, there was a fire at the Claimants' home and the home sustained major damage. The interior of the home was almost a total loss. The Claimants' insurance company, Travelers Insurance, moved them into a temporary apartment and assigned the Respondent to repair their home.
3. On November 6, 2014, the Claimants and the Respondent entered into a contract to restore the Claimants' home.
4. The original agreed-upon contract price was \$191,181.15.
5. The Claimants' insurance company paid the Respondent directly and in full.
6. On May 18, 2015, the insurance company directed the Claimants to move back into the home, although not all of the work had been completed.

7. After returning to the home, the Claimants discovered the following problems in the Respondent's work:

- the drain in the laundry room was filled with concrete and carpeted over
- the furnace room was not ventilated
- one heating vent was installed inside a wooden cabinet in the kitchen, causing the cabinet to heat up when the door is closed
- the floor of the sun room was elevated to allow for an "open concept" first floor, which impacted the exit; the Respondent built a step to allow for exiting onto the deck, but it is too narrow to stand on
- on an outside stairway, the Respondent removed the iron railing from one side and replaced it with an ugly wooden railing, leaving the original iron railing on the other side
- the Respondent failed to replace the built-in bookshelves in the basement family room, as promised
- the Respondent installed a granite slab along the edge of the kitchen counters instead of a tile backsplash
- a carpet runner up the main stairway was installed off center
- in the upstairs guest bathroom, water flows from the sink into a drawer in the vanity
- instead of installing a section of parquet flooring in the basement to match the original flooring, the Respondent carpeted the entire basement
- three ceiling fans were not installed
- interior doors do not match

- the closet door in the family room was not installed in a track
- a screen door was installed upside down

8. Within days after the Claimants' return to their home, a water leak developed in the kitchen ceiling. The Respondent returned to plaster over the leak, but never painted the repaired area.

9. The Respondent's team of workers changed frequently, making it difficult for the Claimants to communicate with the Respondent. The Claimants made several requests for the Respondent to complete the job and make the needed repairs, but the Respondent stopped communicating with them.

10. To repair the listed problems the Claimants will be required to pay Michael & Son Services, Inc. as follows:

- remove granite backsplash and provide and install tile: \$2,900.00
- install a new drain in the laundry room: \$4,550.00
- provide, install, and paint four six-panel hollow doors and one sliding closet door: \$2,450.00
- remove the vent opening in the kitchen cabinet and repair wall: \$1,800.00
- remove vanity in guest bathroom, remove, but reuse, the toilet, tile two walls, provide and install new vanity and vanity top: \$5,395.00
- remove carpet in basement in 112 square foot area and replace with engineered parquet flooring: \$3,880.00
- provide and replace carpet on main stairway: \$950.00
- provide and install louvered door in basement utility room: \$450.00
- install three ceiling fans: \$627.57

Total estimate: \$23,002.57

11. In their Claim filed on July 26, 2017, the Claimants requested reimbursement from the Fund of \$11,376.00.

DISCUSSION

In this case, the Claimants have the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); 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);³ *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 Claimants have proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimants. The Claimants were assigned to the Respondent by their insurance company. The Claimants said that the Respondent did many things well during the reconstruction of their home, but some things were done poorly or left undone. The construction team turned over so often while the work was progressing that the Claimants had difficulty communicating with the Respondent. After making some promises, such as building a bookshelf

³ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume of the Maryland Annotated Code.

to replace a built-in bookshelf that was removed during reconstruction, the Respondent stopped communicating or appearing for work.

Many of the problems were discovered by the Claimants themselves once they moved back into the home. For instance, they discovered heat radiating from inside one of the kitchen cabinets; saw a screen door installed upside down; noticed the interior doors did not match and the closet door was not installed on a track; realized granite had been installed in place of a tile backsplash; found water leaking into a drawer in the bottom of the vanity in the guest bath; missed the three ceiling fans that were not installed; realized the step leading from the sun room to the deck was too narrow to safely step on; missed the parquet flooring in the basement that had been removed and replaced with carpet; and saw that the carpet had been installed off center on the main stairway leading to the upstairs of the house.

Eventually, the Claimants obtained estimates from another company, Michael & Son Services, Inc., to repair or replace the problem work left by the Respondent. That contractor noticed other problems, such as the laundry room floor drain that had been filled in with concrete and covered with carpet. The estimated cost of doing the work to correct and replace all of the inadequate work left by the Respondent is \$23,002.57.

The evidence supports a finding that the Respondent performed unworkmanlike, inadequate or incomplete home improvements and the Respondent has failed to refute the evidence. I thus find that the Claimants are eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimants' actual loss and the amount, if any, that the Claimants are entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations

provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. COMAR 09.08.03.03B(3).

In this case, the Respondent performed some work under the contract, and the Claimants intend to retain other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimants' actual loss:

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).

Using this formula, the Claimants' actual loss would be \$23,002.57, representing the amount paid under the original contract (\$191,181.15) plus the amount required to pay another contractor to repair the poor work done (\$23,002.57), less the original contract price (\$191,181.15).

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimants' actual loss of \$23,002.57 exceeds \$20,000.00. Thus, the Claimants' recovery would normally be limited to \$20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

In this case, however, the Claimants only filed a Claim for \$11,376.00 in reimbursement. When questioned about why the Claim was much lower than the estimate for work to be completed, they said they did not really understand the claim form, the estimated cost to replace

the laundry room drain was a lot more than they anticipated, and they really did not know how they came up with the amounts they included in the claim form.

The Fund argued that the claim form put the Respondent on notice of the amount the Claimants were seeking and that amount has never been amended. Accordingly, pursuant to principles of due process and basic fairness to the Respondent, the Claimants should not be awarded more than they requested in the original claim.

I agree that the Claimants are limited to \$11,376.00, the amount they requested in the claim form because the Claimants have never amended the Claim and it is the only amount of which the Respondent was notified. The APA provides that “[a]n agency shall give reasonable notice of the agency’s action.” Md. Code Ann., State Gov’t § 10-207 (2014). The Court of Appeals has often reiterated that “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Barrie-Peter Pan Sch., Inc. v. Cudmore*, 261 Md. 408, 420-21 (1971) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950)). Accordingly, I conclude the Claimants have proven eligibility for reimbursement in the amount of \$11,376.00.

PROPOSED CONCLUSIONS OF LAW

I conclude the Claimants have sustained an actual loss of \$23,002.57 as a result of the Respondent’s acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(2) and (3)(c). I further conclude the Claimants are limited to recovering a compensable loss of \$11,376.00 from the Fund. Md. Code Ann., State Gov’t § 10-207 (2014); *Barrie-Peter Pan Sch., Inc. v. Cudmore*, 261 Md. 408, 420-21 (1971) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950)).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$11,376.00; 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;⁴ and

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

Signature on File

April 11, 2018
Date Decision Issued

Joy W. Phillips
Administrative Law Judge

JLP/dlm
#173293

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 14th day of June, 2018, 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