

IN THE MATTER OF THE CLAIM	* BEFORE TRACEY JOHNS DELP,
OF ABRAHAM AND RENEE	* AN ADMINISTRATIVE LAW JUDGE
WITHERSPOON,	* OF THE MARYLAND OFFICE
CLAIMANTS	* OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	* OAH No.: DLR-HIC-02-17-18408
IMPROVEMENT GUARANTY FUND	* MHIC No.: 17(75) 1047
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF VENECIA	*
CATLIN-BUTLER,	*
T/A A.S. HOME IMPROVEMENT,	*
RESPONDENT	*

* * * * *

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STATEMENT OF THE CASE

On April 28, 2017, Renee Witherspoon (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$66,618.65 in alleged actual losses suffered as a result of a home improvement contract with Venecia Catlin-Butler, trading as A.S. Home Improvement (Respondent). The Claimant signed

the MHIC claim form and identified herself as holding a power of attorney for her father, Abraham Witherspoon.

I held a hearing on Tuesday, September 19, 2017 at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland 21031. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015 & Supp. 2017).¹ The Claimant represented herself. Mr. Witherspoon was not present. Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent represented herself.

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); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

Did a home improvement contract exist between the Claimant and the Respondent?

If so, did the Claimant suffer an actual loss that results from an act or omission by the Respondent as a licensed contractor that is recoverable from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibit on the Claimant's behalf:

CL Ex. 1 - Letter from the Office of the State's Attorney, Baltimore County, to Abraham Witherspoon, March 17, 2017.

The Respondent did not offer any exhibits on her behalf.

¹ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume and 2017 Supplement.

I admitted the following exhibits on behalf of the Guaranty Fund:

- GF Ex. 1 - Notice of Hearing, dated July 11, 2017; Hearing Order, June 9, 2017;
- GF Ex. 2 - Respondent's licensing history;
- GF Ex. 3 - Check and Disbursement Check Voucher, \$66,618.65, August 28, 2015;
- GF Ex. 4 - Cashier's Check(s),² \$30,000.00, September 5, 2015; and Cashier's Check Credit Copy, September 8, 2015;
- GF Ex. 5 - Home Improvement Claim Form; and
- GF Ex. 6 - Circuit Court for Baltimore County, Maryland, Judgment, issued January 25, 2017; Judgment of Restitution, dated January 20, 2017.

Testimony

The Claimant testified on her own behalf and presented the testimony of Adrian Warrington, Sr.

The Respondent testified on her own behalf and presented the testimony of Myron Gaines.

The Fund offered no testimony.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. Abraham Witherspoon is the owner of the home relevant to this Claim. A fire caused damage to his kitchen.
2. The Claimant is Abraham Witherspoon's daughter. She assists him with his affairs.
3. In order to authorize release of insurance funds for the kitchen repairs, Mr.

Witherspoon's insurance company required a licensed home improvement contractor on the job.

² All exhibit pages were redacted prior to submission into evidence. I am unable to determine whether the first two pages are duplicative.

4. The Claimant is a member of A Homes, LLC, a company that buys, renovates, and sells properties. The Claimant wanted A Homes, LLC to perform the repairs to her father's kitchen.

5. Neither the Claimant nor any member of A Homes, LLC is a licensed home improvement contractor.

6. The Claimant's friend, Mr. Warrington, has known Mr. Gaines for decades. Mr. Warrington knew Mr. Gaines to perform home improvement work and believed Mr. Gaines could assist the Claimant with the insurance company's licensing requirement.

7. Mr. Gaines gave the Claimant the Respondent's MHIC license number to use in order to satisfy the insurance company's licensing requirements. The parties agreed the insurance checks would be disbursed through the Respondent's business account; A Homes, LLC, an unlicensed contractor, would perform the repair work; and Mr. Gaines would be financially compensated for his participation in the arrangement.

8. Mr. Gaines is not a licensed home improvement contractor. His license has been revoked for years.

9. Mr. Gaines is employed by A.S. Home Improvement.³

10. The Respondent, trading as A.S. Home Improvement, is a licensed home improvement contractor under MHIC license number 96201. (GF Ex. 1).

11. The Claimant and the Respondent did not enter into a written contract.

12. Sometime prior to September 3, 2015, Mr. Gaines received a check payable to A.S. Home Improvement and Abraham Witherspoon. Mr. Gaines deposited the check in an A.S.

³ Mr. Gaines referred to himself as the "CEO" of A.S. Home Improvement. The Respondent testified and identified Mr. Gaines as a "field supervisor" for A.S. Home Improvement.

Home Improvement bank account and distributed the funds in a manner satisfactory to the Claimant.

13. On or around September 3, 2015, Mr. Gaines received a check payable to A.S. Home Improvement and Abraham Witherspoon in the amount of \$66,618.65. (GF Ex. 3). Mr. Gaines deposited the check in an A.S. Home Improvement bank account. Soon after September 3, 2015, Mr. Gaines withdrew all or nearly all of the \$66,618.65 for his own personal use.

14. The Claimant and Mr. Warrington met with the Respondent in an effort to locate Mr. Gaines and the missing money.

15. Mr. Gaines was prosecuted for the theft in the Circuit Court for Baltimore County. On January 25, 2017, a Judgment was entered in the Circuit Court for Baltimore County in favor of Abraham Witherspoon and against Mr. Gaines in the sum of \$66, 618.65. (GF Ex. 6).

DISCUSSION

In this case, the Claimant has the burden of proving the validity of her 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)). For the following reasons, I conclude that a home improvement contract did not exist between the Claimant and the Respondent; therefore, the Claimant failed to meet her burden of proof. As a result, I need not address the second Issue.

A home improvement contract is “an oral or written agreement between a contractor and owner for the contractor to perform a home improvement.” Md. Code Ann., Bus. Reg. § 8-101(h).⁴ An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.”⁵ 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”).

The Claim

The Claimant testified that her father is eighty-five years old and she handles his personal affairs. When a kitchen fire damaged his home, his insurance company required repairs to be performed by a licensed contractor. The Claimant explained that she wanted her company, A Homes, LLC, to perform the repair work, but no member of A Homes, LLC held a home improvement license. The Claimant testified that her friend, Mr. Warrington, has known Mr. Gaines for many years and believed Mr. Gaines could assist her with the licensing requirement. Mr. Warrington facilitated a meeting between the Claimant and Mr. Gaines. As a result of the meeting, the Claimant asserted she had an oral agreement with Mr. Gaines for A.S. Home Improvement to serve as general contractor and oversee repairs to her father’s kitchen. She

⁴ Home improvement is defined as follows:

(g)(1) “Home improvement” means:

- (i) the addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building or part of a building that is used or designed to be used as a residence or dwelling place or a structure adjacent to that building; or
- (ii) an improvement to land adjacent to the building.

(2) “Home improvement” includes:

- (iii) connection, installation, or replacement, in the building or structure, of a dishwasher, disposal, or refrigerator with an icemaker to existing exposed household plumbing lines;
- (iv) installation, in the building or structure, of an awning, fire alarm, or storm window; and
- (v) work done on individual condominium units.

Bus. Reg. § 8-101(g)(1-2)(2015).

⁵ The Fund argued that the Claimant did not have standing to file a claim because she is not the property owner. The Claimant replied that she holds a power of attorney on her father’s behalf. The Claimant failed to produce the power of attorney; therefore, I do not know what authority it provides. The holder of a power of attorney might be an “other person who buys, contracts for, orders, or is entitled to a home improvement.” Bus. Reg. § 8-101(k). Assuming the Claimant holds a power of attorney which authorizes her to enter into contracts on her father’s behalf, she would not prevail in this case for the reasons stated.

explained that as a result of this agreement, the insurance company released the repair funds in installments. The first check was issued to her father and A.S. Home Improvement. Mr. Gaines deposited the check in an A.S. Home Improvement bank account and distributed the funds in a matter satisfactory to her. Problems arose around September 3, 2015 when Mr. Gaines received a second check in the amount of \$66,618.65, also payable to A.S. Home Improvement and the Claimant's father. The Claimant testified that Mr. Gaines deposited the check in an A.S. Home Improvement bank account then promptly withdrew all or nearly all of the \$66,618.65 for his own personal use. He was prosecuted for the theft in Baltimore County, and on January 25, 2017, a Judgment was entered in the Circuit Court for Baltimore County in favor of Abraham Witherspoon and against Mr. Gaines in the sum of \$66,618.65. The Claimant seeks reimbursement from the Fund and identified \$66,618.65 as the amount of her Claim.

The Respondent's Position

The Respondent testified that she had no knowledge of any arrangement between the Claimant and Mr. Gaines until she was asked about the missing money. She met Mr. Warrington and the Claimant on her doorstep when they arrived at her home and demanded the money. The Respondent explained that once she discovered the funds had been withdrawn from the business account, she telephoned Mr. Gaines for an explanation. He did not answer her phone call.

Mr. Gaines, the Respondent's employee, testified that he met with the Claimant and agreed to permit the Claimant to use the Respondent's MHIC license number in exchange for a fee. He explained his role was to "broker" the funds and in exchange, he would receive a portion of the money. He acknowledged accepting two checks payable to Abraham Witherspoon and A.S. Home Improvement and depositing them in an A.S. Home Improvement bank account. Because of some perceived wrongdoing years ago by Mr. Warrington, Mr. Gaines believed he

was somehow entitled to convert the second check to his own personal use. He was prosecuted and convicted for that offense in Baltimore County. Mr. Gaines acknowledged the crime, but regarding any allegations of home improvement work, stated he was nothing more than a "stoolie" responsible for depositing money in a licensed home improvement contractor's account, then transferring it as directed by the Claimant.

Analysis

Despite his theft conviction, I find Mr. Gaines' testimony more credible than the Claimant's testimony. The Claimant offered no evidence of any damage to her father's residence. She offered no testimony about the type of work involved in any repair. Despite testifying that her father's insurance company required repair work to be overseen by a licensed home improvement contractor, she failed to produce any documents she submitted to the insurance carrier in order for it to issue checks payable to her father and A.S. Home Improvement. No testimony was offered by any witness about the performance of any general contractor work at any time by Mr. Gaines or A.S. Home Improvement. It appears that problems only arose when Mr. Gaines stole the second check. Had this arrangement between the Claimant and Mr. Gaines involved A.S. Home Improvement serving as a general contractor and performing proper oversight of A Homes, LLC's repairs, there should have been some testimony on that subject. In fact, the Claimant testified that despite the theft of money, A Homes, LLC continued repair work on her father's residence. She neglected to offer any testimony as to whether another licensed contractor was hired to oversee the continuation of the project. Presumably she did not incur the expense of hiring a licensed home improvement contractor, because she only listed the amount of the second check, \$66,618.65 as the Claim amount.

Home improvement, as defined in section 8-101(g) of the Business Regulation article requires some “modernization, remodeling, repair, or replacement.” Bus. Reg. § 8-101(g)(1). There is not sufficient evidence to demonstrate that the Claimant and Mr. Gaines’ agreement was anything more than an agreement to disburse money through a licensed home improvement contractor’s bank account. Such an agreement is not home improvement pursuant to the Business Regulation article. Accordingly, I find that a home improvement contract did not exist, and the Claimant is not eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

Based on the foregoing Proposed Findings of Facts and Discussion, I conclude, as a matter of law, that the Claimant has not sustained an actual loss compensable by the MHIC Fund because a home improvement contract did not exist. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2017); COMAR 09.08.03.03B(2).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimants’ April 28, 2017 claim; and

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

Signature on File

October 25, 2017
Date Decision Issued

Tracey Jones Deip
Administrative Law Judge

TJD/dlm
#170007v3

PROPOSED ORDER

WHEREFORE, this 14th day of December, 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.

Andrew Snyder

***Andrew Snyder
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION