

<p>IN THE MATTER OF THE CLAIM</p> <p>OF RUTH CHOATE,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF BUM HO KIM,</p> <p>T/A TRANSNATIONAL</p> <p>CORPORATION,</p> <p>RESPONDENT</p>	<p>* BEFORE JOY L. PHILLIPS,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: DLR-HIC-02-17-16515</p> <p>* MHIC No.: 17 (75) 375</p>
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STATEMENT OF THE CASE

On February 3, 2017, Ruth Choate (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$11,580.00 in alleged actual losses suffered as a result of a home improvement contract with Bum Ho Kim, trading as Transnational Corporation (Respondent).

I held a hearing on August 24, 2017 at the Prince George's County Office Building. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented herself. Hope

Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Eugene W. Policastri, Esquire, represented the Respondent, who was present.

The contested case provisions of the Administrative Procedure Act, 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); Code of Maryland Regulations (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, unless otherwise noted:

- Clmt. Ex. 1, 2, 3, 6A-J, 7, 8A-B, 9, 10A-I, 11, 12A-B - Photographs
- Clmt. Ex. 4 - Contract, April 21, 2016
- Clmt. Ex. 5 - Correction Order, October 20, 2016
- Clmt. Ex. 13 - (Not admitted)
- Clmt. Ex. 14 - Proposal from Sundecks, January 25, 2017

I admitted the following exhibits on the Respondent's behalf:

- Resp. Ex. 1, 2, 3, 4 - Photographs
- Resp. Ex. 5 - Change Order, May 26, 2016
- Resp. Ex. 6 - Permit Plan, October 12, 2016
- Resp. Ex. 7 - Railing Installation Guide, undated

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Notice of Hearing
- Fund Ex. 2 - Licensing History, printed August 23, 2017
- Fund Ex. 3 - Letter to Respondent, February 9, 2017, with attached copy of Claim

Testimony

The Claimant testified in her own behalf.

The Respondent testified in his own behalf and presented the testimony of Nicholas Renzella, Installation Manager for the Respondent.

The Fund presented no 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 licensed home improvement contractor under MHIC license number 01-107406.
2. On April 21, 2016, the Claimant and the Respondent entered into a contract to remove the deck flooring from the Claimant's existing 16 x 24 foot deck at her home and replace the flooring with Trex boards, a maintenance-free composite. The Respondent would also install coordinating railing, trim, and benches, as well as one light on each step riser. The new deck flooring would be laid on the existing deck frame.
3. The original agreed-upon contract price was \$25,840.00.
4. The Claimant paid a deposit of \$2,500.00 on April 21, 2016. The balance was later paid in full by Wells Fargo Bank, through whom the Claimant had financed the project.
5. The deck is encircled by posts with a connecting railing joining the posts. The posts are wooden and are covered by a vinyl cover. There are caps on tops of each post.
6. The Claimant wanted a cocktail railing, which is wide and flat, allowing for drinks to be set on top. She had seen this rail depicted in an advertising photo and believed that is what she paid for. When the railing arrived for installation, it was rounded. The Respondent agreed that the railing would be changed to the cocktail variety. On May 26, 2016, the parties

entered into a Change Order addressing the railing, post caps, and benches at no extra cost to the Claimant. The new post caps included a lighting feature. The Change Order addressed the color of the benches.

7. After the cocktail railing was installed, the Claimant was dissatisfied with the width of the railing because it extended slightly beyond the posts. However, the contract did not specify the width of the railing. Additionally, this was the only width the Respondent could use in the color specified by the Claimant.

8. At some point during installation, the installers used extra glue to attach the post caps. Some of the glue ran down the sides of some post covers, leaving unsightly white stains. The Respondent washed off most of the stains, but some remain.

9. On October 12, 2016, after complaints about the deck were raised, the Respondent filed his building plans with the County Permitting, Inspections and Enforcement office. The plans were approved.

10. On October 20, 2016, the Prince George's County Inspections Division inspected the Claimant's deck. On that date, an inspector for the Prince George's County Inspections Division issued a Correction Order requiring an environmental report for the materials and noted that a loose guard rail needed to be addressed.

11. In addition to the loose guard rail, a few of the cuts on the Trex boards are sloppy. One post cap is cracked, but the date this occurred is unknown. The edge of one board needs to be smoothed out. There are unsightly holes in one bench that resulted from one bench being rebuilt a few times. One floorboard is slightly shorter than the adjoining floorboard. A piece of an electrical wire hangs down beneath the railing.

12. On an unknown date, the Respondent personally went to the Claimant's home to examine the deck. The only complaints the Claimant made to the Respondent were related to the remaining glue stains and the holes in the side of the bench. She did not point out to him the loose guard rail, the sloppy cuts, or the cracked post cap.

13. The Trex company provided the Respondent with a remedy for the stains. He was directed to use a touch up pen to cover the stains, similar to what automotive manufacturers use for minor flaws in paint. Trex told the Respondent this remedy would not void the warranty on the materials. The Claimant would not permit him to utilize this remedy.

14. The issues on the Claimant's deck are minor, constituting punch list items that could be repaired in a matter of a few hours. The Claimant does not want the Respondent to make the repairs.

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)).

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);¹ see also COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a

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

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 not proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The contract called for the Respondent to remove decking boards on the existing 16 x 24 foot deck at the Claimant’s home and replace them with Trex boards, a composite, maintenance-free board. The deck is encircled by a railing. Caps sitting atop the posts contain lights. To comply with the Claimant’s wishes, the Respondent rebuilt two benches that existed on the deck, moving them to sit in corners of the deck rather than being freestanding.

The Claimant testified that from a distance, the deck is beautiful, as the photographs plainly show, but when one examines the deck closely, one can see unsightly mistakes that, in her view, make the deck unusable. She said she refuses to use the deck and argued that for the money she paid for the deck, it should not have problems.

She primarily interacted with the Respondent’s employees, although, after the post stains left from glue residue became apparent, she contacted the Respondent, who personally visited her home and examined the deck. She pointed out the stains to him and the holes in the side of one of the benches. She did not complain to him about the cracked post cap, uneven cuts, unsightly gaps between some of the boards, or the wire hanging down, raising those issues later in the process. She said she asked the Respondent to remove and replace all of the posts and railings due to the unsightly stains, but the Respondent refused to do this. At the hearing, she raised a new issue regarding the lack of “sleeves” around the bottom of the bench posts, even though the contract does not call for such sleeves and she had not previously raised this issue.

In her testimony, the Claimant said the inspector who examined the deck in October 2016 found one post that was loose; in his report, he refers to this as a loose guard rail. (Clmt. Ex. 5.) She went on to say that she believes all of the posts might be loose and that someone might lean on the railing and not be safe.

The Respondent noted that she initially complained to him only about the stains and the holes in the bench, but that by time of the hearing, her list of complaints had grown. As a result, he argued, he was not initially aware of many of the complaints. For example, he did not know there was a loose railing or a cracked post cap. Regarding the gaps between some of the boards, his witness testified that such gaps are required to allow the boards to expand and contract in various temperatures. The Respondent testified that the bench post sleeves described by the Claimant are not a standard part of the installation of Trek products. Regarding the complaints she did present to him, the Respondent testified that he offered an approved fix for the stains, which, he said, were created when the Claimant herself told the worker to use more glue than he normally did, an allegation the Claimant denies.

The Claimant said she is not interested in the approved fix, and furthermore, does not want the Respondent's employees to make the repairs to the deck because, she believes, they would be hostile to her. She prefers that someone else make the repairs. She had another company, Sundecks, examine the deck and make a proposal. That proposal calls for removing and replacing all deck rail posts and railing, using a different type of top railing, removing and replacing the two benches to make them freestanding, and removing and replacing five deck boards where the corner benches had been installed. (Clmt. Ex. 14.) I found it interesting that the proposal did not call for replacing any of the other deck boards, including the ones the

Claimant found objectionable. No one from Sundecks testified and thus, there was no testimony justifying the extent of the proposed work. The proposed cost of the work was \$11,580.00.

By contrast, the Respondent testified that he added up all of the complaints the Claimant had made, determined the cost of the materials and labor, and said he could make the repairs for \$600.00, including repairing the boards the Claimant was not happy with. When further questioned, he added another \$100.00 to fix the stains, which were omitted from his first estimate. (Resp. Ex. 8.)

I conclude the issues raised by the Claimant constitute minor, punch list items that could easily be repaired by the Respondent at a nominal cost. They are primarily aesthetic, although the cracked post cap is not. The Respondent argued that the cap could have been cracked subsequent to the completion of the contract, something that is possible given that it was not mentioned in the inspection done on October 20, 2016, or pointed out by the Claimant when the Respondent examined the deck. There is no evidence to support her assertion that all of the posts need to be secured. The credible evidence is that only one was loose.

The biggest concern is the stains that remained on the post covers. The parties believe the stains were caused by glue running down the posts. The Respondent's employees told him the Claimant directed them to add extra glue; the Claimant denies this. I do not need to resolve that issue however. It is enough that the stains exist and are unsightly. In the photographs, they look white against a tan deck. The Claimant's testimony and exhibits were unclear regarding how many stains there were, but from the photographs presented, I believe the stains are in three places. The Trex company provided the Respondent with a solution to the stains, but the Claimant is not satisfied with that solution.

Although the stain solution is not ideal, it represents a reasonable response to a construction error that the Claimant should have accepted. All of the other complaints could easily be repaired with minimal labor time. The evidence does not support her assertion that the entire railing and all of the posts and caps need to be removed and replaced. Even if she were to do that, there is no guarantee she would be left with a perfect deck, which is what she seems to demand. Every construction project ends with minor issues that need to be addressed. Those punch list items are routinely handled by the contractor, which is what should have happened here. Just because there remain minor issues that need to be addressed does not mean the contractor performed in an unworkmanlike, inadequate or incomplete way, however.

The Respondent estimated the cost of having the repairs made and the Fund argued that, if I found his performance to be unworkmanlike or inadequate, I could accept his estimate as a reasonable amount to reimburse her. Instead, I do not find the Claimant showed by a preponderance of the evidence that the Respondent's performance was unworkmanlike or inadequate.

Furthermore, the Commission may deny a claim if the Commission finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d). By her own admission, the Claimant does not want the Respondent to make the requested repairs. I find this position unreasonable. The Respondent attempted to complete the contract in good faith by entering into a change order which called for the correct railing and added lighting to the post caps. He removed the stains that could be removed and offered to apply the recommended fix to the remaining post stains. The Respondent offered to make the other needed repairs back in 2016 and again at the hearing. There is no reason the Respondent could not adequately make all of the repairs except that the

Claimant does not want his crew on her property. I find this exclusion to be unreasonable. Accordingly, I would not find reimbursement to be warranted, even if I had found the Respondent performed in an unworkmanlike or inadequate way.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not 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(2).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

Signature on File

October 13, 2017
Date Decision Issued

Joy L. Phillips
Administrative Law Judge

JLP/dlm
#170121