IN THE MATTER OF THE CLAIM	*	**BEFORE MARC NACHMAN,**
OF CHIOMA ADIGWE,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT,	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF GEORGE EKWUNO,	*	
T/A THE NOBLE HOUSE, INC.,	*	**OAH No.: DLR-HIC-02-18-35110**
RESPONDENT	*	**MHIC No.: 17 (05) 795**

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE

On November 5, 2018. Chioma Adigwe (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $16,516.69 in actual losses allegedly suffered as a result of a home improvement contract with George Ekwuno, trading as The Noble House, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015) (Bus. Reg.). On November 5, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on February 15, March 11 and April 30, 2019 at the OAH in Hunt Valley, MD. Bus. Reg. § 8-407(e). Tedeisha Rowe, Esquire, and Tiffany F. Boykin, Esquire, represented the Claimant, who was present. Jude Wikramayake, Esquire, represented the Respondent, who was present. Hope Sachs, Assistant Attorney General, Department of Labor[1] (Department), represented the Fund. Code of Maryland Regulations (COMAR) 28.02.01.23A.

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. 2018); 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

Clmt. Ex. 1 – Home Improvement Contract, dated June 26, 2016, with attachments;

Clmt. Ex. 2 –A-H, Payments made to Claimant by credit card and checks, and related correspondence;

Clmt. Ex. 3 – A–Z, Photographs, undated;

Clmt. Ex. 4 – Cabinet worksheet, undated;

Clmt. Ex. 5 – Text messages to Respondent from Claimant, dated September 21 and 23, 2016;

Clmt. Ex. 6 – Beltsville Paving Contract estimate, dated June 20, 2017;

[1] On July 1, 2019, the Department changed its name from the Department of Labor, Licensing and Regulation, to its present name.

Clmt. Ex. 7 – Estimate, Associated Adjusters Network (Associated), dated February 13, 2016;

Clmt. Ex. 8 – Letter from Patrick Tachie-Menson, Esquire, to Respondent, dated October 20, 2016;

Clmt. Ex. 9 – Check from IDS Property Casualty Insurance Co. to Claimant, dated June 16, 2016;

Clmt. Ex. 10 – QBE Property Loss Department (QBE) Repairs Affidavit signed by Claimant, dated July 7, 2016;

Clmt. Ex. 11 – Receipt for Property Inspection Report Services on Claimant's property, dated September 7, 2016;

Clmt. Ex. 12 – Letter from Seterus[2] to Claimant, dated June 22, 2016;

Clmt. Ex. 13 – Ameriprise Auto & Home Insurance, IDS Property Casualty Insurance Company (Ameriprise) claim email to Claimant, dated April 22, 2016;

Clmt. Ex. 14 – Exhibit not admitted;

Clmt. Ex. 15 – Ameriprise claim email to Claimant, dated April 22, 2016;

Clmt. Ex. 16 – Exhibit not admitted;

Clmt. Ex. 17 – Exhibit not admitted;

Clmt. Ex. 18 – Email from Ameriprise to Claimant, dated January 27, 2016.

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

Resp. Ex. 1 – Worksheet related to claim, undated.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 – Notice of Hearing, dated November 21, 2017;

Fund Ex. 2 – Hearing Order, dated October 2, 2017;

Fund Ex. 3 – Review of licensing history of Respondent by MHIC, dated December 11, 2017;

Fund Ex. 4 – Home Improvement Claim Form filed by Claimant, dated April 10, 2017;

Fund Ex. 5 – Letter from HIC to Respondent, dated April 25, 2017.

[2] Seterus now goes by the name "Mr. Cooper." However, because the documents in this matter use the former name, I will refer to that entity as "Seterus" unless otherwise appropriate.

Testimony

The Claimant testified on her own behalf and did not present the testimony of any other witnesses.

The Respondent testified on his own behalf and did not present the testimony of any other witnesses.

The Fund did not present the testimony of any 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 5052879 (expiration July 2, 2019).

2. The Claimant's house was insured by Ameriprise and mortgaged to lender Seterus. Prior to meeting the Respondent, Ameriprise had retained the Associated Adjusters Network (Associated) to estimate the damage to the Claimant's house. Some of that damage included the removal of a tree, roofing work, some interior work (including painting the kitchen), and replacing the siding.

3. The Claimant had some repair work done prior to meeting the Respondent, at a cost of approximately $2,000.00, for which she was paid by her insurer.

4. During June 2016, the Claimant and the Respondent met to discuss home improvements to her house.

5. There were three areas of the Claimant's house that the Respondent undertook home improvement work: the kitchen, the basement and the exterior, the latter of which incurred storm-related damage in January 2016. Specifically, the parties agreed that the Respondent would perform the storm related-damage listed in the Associated estimate.

6. On or about June 26, 2016, the Respondent presented the Claimant with a written contract in the form of a letter referencing the Associated estimate for storm-related damage, agreeing to perform the work outlined in that estimate for $14,927.47, which was the amount of damage estimated in the Associated worksheets. Contractors can also submit supplemental requests to the insurer for additional bills if latent, undiscovered damage is found.

7. At some time before or after the presentation of the June 26, 2016 letter contract, the Claimant and Respondent agreed that he would perform some other home improvement work in the Claimant's house in the kitchen and basement.

8. The parties prepared no written contract concerning the kitchen or basement home improvements; there was no other writing identifying the scope of the work to be done, the materials to be used, the cost of the projects, or any other element describing either party's contractual obligation with the other. Furthermore, the parties prepared no written document encompassing the other prerequisites of a home improvement contract required by Maryland State law – there was no identification of the Respondent's company including a license number, his address or telephone number; no start or completion dates; no payment terms; and no standard MHIC disclosures required to be included in all written home improvement contracts.

9. The Claimant paid the Respondent the following amounts:[3]

Payment method	Date	Amount
Check	May 2, 2016[4]	$30.00
Check	July 6, 2016	$1,500.00
Check	July 15, 2016	$1,000.00
Credit card payments	July 20, 2016	$2,500.00
Credit card payments	July 27, 2016	$2,500.00
Check	September 9, 2016	$1,000.00
	Total	$8,530.00.

[3] Perhaps not all of these payment were for home improvement work, as discussed below. For completeness, all of the Claimant's payments to the Respondent are listed here.

[4] This check was dated May 2, 2016, but it was not negotiated to the Respondent's bank until June 30, 2016, indicating that it was written closer in time to the later date.

10. After the Respondent sent Ameriprise the June 26, 2016 written contract and the required documents (e.g., a "Contractor's Affidavit," MHIC license information, etc.), Ameriprise sent the Claimant a check for $11,278.22 payable to the Claimant and her mortgage company, Seterus, to be held by Seterus in an escrow account pending proof that the work covered by that check had been satisfactorily performed, protecting the interest of the mortgage company by making sure the work was completed as estimated.

11. The Claimant endorsed the check and sent it to Seterus, who deposited it in an escrow account.

12. At the request of Seterus, on or about August 23, 2016, Safeguard Properties Management (Safeguard) inspected the Claimant's house performing a "Drive By Insurance Loss Inspection."

13. As a result of that inspection, on or about September 2, 2016, Seterus sent a check for $10,150.40 to the Claimant, made payable to her and the Respondent.

14. The Respondent repaired some storm-related damage at the Claimant's property. His work was complete enough for Safeguard to inspect property and advise Seterus to release $10,150.40 to the Claimant and Respondent to pay for work that was already done.

15. The Claimant endorsed the $10,150.40 escrow check to the Respondent, her co-payee, who deposited the check in his business account.

16. Seterus would not have sent the $10,150.40 check unless that amount of work identified in the Associated estimate had been performed.

17. After endorsing the check and giving it to the Respondent to deposit, the Claimant wanted the check returned to her.

18. The Respondent would not return the check or pay the Claimant any amounts from the check, stating that it was for work already performed (e.g., microbial painting, attic insulation, carpentry, etc.)

19. On Wednesday, September 21, 2016, the Claimant sent the Respondent a text message from her cell phone telling the Respondent that he needed to complete the home improvement work in the kitchen and return the Seterus check to her. She set a deadline of two days.

20. Two days later, on September 23, 2016, the Claimant terminated her business relationship with the Respondent, still requesting the return of the "$10,000.00" check or its equivalent.

21. On or about June 20, 2017, the Claimant obtained a repair estimate from Beltsville Paving, Inc., for $17,000.00.

DISCUSSION

Applicable law

In this case, the Claimant has 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).[5] "[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)).

[5] As noted above, "COMAR" refers to the Code of Maryland Regulations.

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)[6]; *see also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a licensed contractor"). "'[A]ctual 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 June 16, 2016 Contract for the storm-related damage and performed some work on the basement and kitchen of her house.

Insured Storm-related damage contract

The exterior of the Claimant's house was damaged when a tree fell on it, damaging the siding and the roof, and causing some damage inside the house. The Claimant did receive some money for repairing the roof and removal of the tree, and had that work done by another, unnamed contractor prior to her meeting the Respondent. The remaining storm-related work was estimated to be approximately $11,000.00.

After meeting at some time in June 2016, the Respondent presented to the Claimant a proposal dated June 26, 2016, for his company to perform the insured, storm-related repairs. The contract was signed by the Claimant on June 30, 2016. The contract was for $14,927.47 and it referenced the insurance estimate as the scope of work, and made a specific reference to the "replacement of vinyl siding in it's (sic) entirety and the details of work to be performed will be

[6] Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

exactly outlined by Associated Adjusters Network Estimate[7] which was already been accepted by your Insurance Company..." [sic] Clmt. Ex. 1. There was no reference in that document to any work to be performed in the basement, although the estimate contained a line item related to painting the kitchen, with no reference to countertops or cabinets. The contract amount on the Claimant's claim form submitted to the Fund showed a contract price of $18,908.22 (GF Ex. 4).

The Claimant claims to have paid the Respondent $18,680.40. However, this amount conflates the work that was supposed to have been done on the storm-related claim and for the kitchen and basement home improvements, making it difficult to determine how much each aspect of the work would cost, particularly for the work in the kitchen and basement.

The Claimant's Fund claim

This claim involves three distinct home improvements. The Claimant seeks an award from the Fund for work that she allegedly contracted with the Respondent to perform, but which she says he did not complete. She claims that the Respondent agreed to perform home improvements to her kitchen, but only completed some of the work and "tore it apart," leaving it in worse condition than when he started, and that the work that was done was unworkmanlike and inadequate, and that he abandoned the job. She also claims that the home improvement work that the Respondent agreed to perform in the basement of her house was done in an unworkmanlike and inadequate manner, and that he abandoned the job. Finally, she also claims that the Respondent failed to complete work on the exterior of her house resulting from storm damage, for which she claims he was paid, but which he did not complete because he abandoned the job.

[7] The letter appears to reference Clmt.Ex. 6, the Associated Adjuster's Network estimate referencing a loss on January 22, 2016, a date "entered" of February 11, 2016, and the date that it appeared to be printed – June 6, 2016 - at the bottom of each page.

The Respondent claims that he tried to satisfy the Claimant the best that he could, but that he was terminated before completing the work, asserting that he was not asked to stop working due to workmanship issues, but because he would not participate with the Claimant in what he considered to be insurance fraud. The Respondent asserts that he performed some of this storm-related insured damage repair, and was about to submit a supplemental insurance claim for more exterior repairs on the Claimant's house.

The main impcdiments to the Claimant's claim for an award from the Fund is that there was no written contract for a large portion of the work that she is claiming was the subject of her claim (i.e., the basement and kitchen home improvements) so that the details of the scope of work and costs are unknown. Additionally, the financial transactions between the Claimant and the Respondent, and between the Claimant and her insurer, her mortgage company and the Respondent, are questionable and convoluted. The Claimant's mortgage company Seterus released funds to pay for the insured repairs, which the Respondent testified would not have occurred had that amount of estimated work not been completed.

Contract for insured, storm-related damages

The Claimant testified that she was in contact with Ameriprise, her insurer, and Associated, its adjusters, about the storm-related damage to her house before she met the Appellant in June 2016, as the damage occurred earlier in the winter of 2016. The Claimant testified that when first met the Respondent in her home, they merely discussed the kitchen and basement work, and had no discussions about the siding; this position is belied by the check and credit card payments three and four weeks after the siding contract was signed (Clmt.Ex. 1 and 2A and B). The Respondent claims that he and the Claimant discussed both storm-related damage repair, and kitchen and basement home improvements at the same time. Additionally,

the Respondent claims that he did some repair work on the storm damage before starting the kitchen and basement work, which is consistent with the date of the contract (June 16, 2016) and the date of the first check payment of $1,500.00, dated July 6, 2016 (Clmt. Ex. 2B).[8]

Kitchen and basement home improvements

The Respondent claims that the Respondent was referred to her by a cousin for whom the Respondent did work. The Claimant acknowledged that both she and the Respondent were from Nigeria, but denied knowing him or his family. The Respondent testified that he and the Claimant had "family ties" from Nigeria well before they met to discuss the home improvement work to be done. The Respondent claims that this "familial" relationship explains the lack of written contract for the work in the basement and kitchen. The Respondent testified that such "close" families rarely required written contracts between them.

The Claimant conceded that there was no written contract between her and the Respondent concerning the kitchen and basement work, although there was a written agreement concerning the storm-related siding damage (discussed below). She claimed that she asked the Respondent to write a contract; the Respondent testified that in their Nigerian culture, there is no need for a contract to formalize business transactions.

Both parties agree that the Respondent was to perform home improvement on the basement and kitchen of her house; however the specific details of that agreement were not reduced to writing. The Claimant testified that the Respondent agreed to perform home improvement work in the basement for $2,500.00 and in the kitchen for $5,750.00, but there was no written agreement explaining any of the terms of the contract, the material requirements, or the scope of the work. It is difficult to determine any of the salient features of any such

[8] The assumption is that this check is related to the home improvements, although the memo line written on the check belies that, as discussed below.

agreement between the parties because there was no written contract for the kitchen and basement work.[9] Moreover, as discussed below, the Respondent claims to have performed more work that he "contracted" to do, and now is claiming that he needs to be paid for that work.

In lieu of a contract, the Claimant presented what appeared to be a worksheet created by the Respondent, and that the Respondent claims the Claimant took this paper from him without his consent (Clmt. Ex. 4). The Respondent explained that this document was merely a worksheet; there were dollar amounts written on the sheet, but neither party explained whether these figures were the Respondent's cost for certain items, or the amount he would charge the Appellant. Nevertheless, the exhibit lacks all prerequisites to forming a contract - there is no agreement as to the parties, no scope of work, no price for the work to be performed, nor any special terms required in a MHIC contract - the Respondent's licensing information, the MHIC advice to contact it regarding contractors, a start and completion date, the scope and cost of the work, any financial terms, and most importantly, any signatures indicating the presence of an agreement.

Under the statues regulating home improvement contractors, a "[h]ome improvement contract" can be either an "*oral* or written agreement between a contractor and owner for the contractor to perform a home improvement. Bus. Reg. § 8-101(h) (emphasis added). Although oral contracts are contemplated in one section of the Code, home improvement contracts must be written to meet the specific requirements set forth elsewhere in the statute Bus. Reg. § 8-501(b)-(d), which seemingly precludes oral contracts:

> (b) Each home improvement contract shall:
> (1) be in writing and legible;

[9] The Respondent claims that he did more work than he was required to do, and claims that he is owed significantly more than he has been paid. However, the Claimant's additional obligation to the Respondent is not at issue in the present case.

(2) describe clearly each document that it incorporates; and
(3) be signed by each party to the home improvement contract.

(c)(1) In addition to any other matters on which the parties lawfully agree, each home improvement contract shall contain:

(i) the name, address, telephone number, and license number of the contractor;
(ii) the name and license number of each salesperson who solicited the home improvement contract or sold the home improvement;
(iii) the approximate dates when the performance of the home improvement will begin and when it will be substantially completed;
(iv) a description of the home improvement to be performed and the materials to be used;
(v) the agreed consideration;
(vi) the number of monthly payments and the amount of each payment, including any finance charge;
(vii) a description of any collateral security for the obligation of the owner under the home improvement contract;
(viii) a notice that gives the telephone number and Web site of the Commission and states that:

1. each contractor must be licensed by the Commission; and
2. anyone may ask the Commission about a contractor; and

(ix) a notice set by the Commission by regulation that:

1. specifies the protections available to consumers through the Commission; and
2. advises the consumer of the right to purchase a performance bond for additional protection against loss.

....

(d) Before the performance of a home improvement begins, the owner shall be given a copy of the home improvement contract signed by the contractor.

Although a home improvement contract that does not comply with this section is not invalid merely because of noncompliance, there are practical reasons to reduce a home improvement contract to writing.[10] Bus. Reg. § 8-101(a). Without the specific terms of the contract noted above in subsection (c), above (e.g., "(iv) a description of the home improvement to be performed and the materials to be used; (v) the agreed consideration"), there is no way to

[10] Harmonizing the statutes, it is not unlawful for a contractor to perform home improvement work under an oral agreement, but the parties give up advantages and rights that a written contract would protect. For example, a contractor may replace a kitchen cabinet "on a handshake," the ultimate oral contract. However, if questions arise as to the price or scope of the work, neither party has a written agreement on which it can rely to pursue one party's claim against the other.

determine what work was to be done and the cost of that work, both questions left unanswered in this matter.[11] Bus. Reg. § 8-501.

Financial transactions between the parties

The financial transactions between the parties were not well presented and, therefore, difficult to follow. Before meeting the Respondent, the Claimant had already put in an insurance claim and had been paid for some work related to the storm damage. The Respondent claims that, due to the earlier storm-related damage, there was water damage to the ceiling, requiring drywall work, painting, application of a microbial agent, attic insulation and some minor carpentry – not all of the work involved the exterior siding repair. He claims to have performed this work.

Payment documents showing the transactions between the parties were included in Clmt. Ex. 2. On July 6, 2016, the Claimant paid the Respondent a check for $1,500.00 with the memo line reading either "the boys" or "the boxes (sic)." Clmt Ex. 2B. Two credit card payments were made to the Respondent's company: $2,500.00 on July 20, 2016, and $2,500.00 on July 27, 2016 (Clmt Ex. 2A). The Claimant presented a check for $30.00 dated May 2, 2016,[12] without the payee identified, although it was seemingly endorsed by the Respondent, with the words "the boys" on the memo line (Clmt. Ex. 2D). On the Claimant's $1,000.00 check,[13] dated July 15, 2016, made payable to the Respondent (and not his company), the word "basement" was written

[11] See also, Maryland's "Statute of Frauds": "...contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought ...." Md. Code Ann., Com. Law § 2-201.

[12] Although the check was dated May 2, 2016, the bank posted the deposit on June 30, 2016. Neither party explained the discrepancy in dates.

[13] The Respondent claims that this check was intended for a truck driver who was supposed to transport and/or store iced tea that the Claimant makes. The Respondent claims that the trucker reneged on his obligation, so the Respondent cashed the check and left her the cash in a drawer in her house. As far-fetched as this tale seems to be (and particularly about his cashing the check and leaving her the cash, which she denies having received), because of the outcome of this case, the purpose of this check is insignificant.

on the memo line (Clmt. Ex. 2C). The Claimant's final check payable to the Respondent (and not his company) for $1,000.00 was dated September 9, 2016, with no references on the memo line (Clmt. Ex. 2E); the word "loan" was written on the bottom of the copy submitted into evidence by the Claimant.

There were no other documents evidencing the purpose of any of those payments other than the one for $1,000.00 referencing the word "basement." But even with that reference, there was no document evidencing the scope of any of the home improvement work in the basement.

Processing a storm-related insurance claim and payments

The Respondent testified with some authority about making insurance related repairs, having shown by his testimony that he was familiar with the process.

Before an insurer will authorize the repair work to be done, the contractor retained by the homeowner to perform the work is required to provide it with several documents: a certificate of insurance, proof of MHIC licensing, a W-9 tax form, and most significantly, a written contract detailing the scope of work that the contractor intends to perform. The latter requirement is apparently the reason for the preparation and signing of the written contract (Clmt. Ex. 1).

The Respondent explained the process occurring after an insurance claim for covered damages is made. Initially, the insurer may send out an appraiser, who determines what work has to be performed and estimates the cost of the repair, for both material and labor. The insurer sends a check to cover the estimate (less depreciation, which, under replacement cost policies, can be paid after the repairs are made), made out to the homeowner and his or her mortgage company. Generally, the homeowner signs the check over to the mortgage company to be held in its escrow account, to be paid to the homeowner and or the contractor retained to make the repairs. After the mortgage company is advised that the repairs have been made, it dispatches an

appraiser to inspect the work to determine what has been done, and the escrow check is then released to the homeowner and/or the contractor.

There were multiple transactions between the Claimant, her insurer Ameriprise, its adjusters Associated, Seterus, her mortgage company, and Safeguard, the inspection company retained by Seterus to ensure that the escrowed amounts could properly be disbursed. These transactions were not adequately explained by the Claimant. In the June 16, 2016, letter from the Claimant's insurer, it appears that Seterus and the Claimant were copayees on Ameriprise's check sent to pay for repairing the storm-related damage in the amount of $11,278.22 (Clmt. Exs. 9, 2H).[14]

Seterus' most recent check sent to the Claimant was dated September 2, 2016, in the amount of $10,150.40 and was intended to cover the estimated, insured repairs (Clmt.Ex. 2F), payable to the Claimant and the Respondent's company.[15] The release of that check followed a Property Inspection by Safeguard (Clmt.Ex. 11), for "Property Services – Insp – Drive By Insurance Loss Inspection...Note: IL WITH SCOPE OF WORK."[16] The Respondent claims that he was present when the inspector came by; he claims that the inspector saw that enough of the insurance estimated work was done, that it recommended that Seterus release funds for the work that was done; nevertheless, neither party submitted into evidence the inspection report explaining what work was completed. This inspection, which referenced Seterus as the invoicee, seems to confirm that Seterus released the funds, although there were no documents presented at

[14] Significantly, and characteristic of the Claimant's presentation, the letter appears to be a multi-page letter, but only the first page was presented into evidence; the obvious lack of a signature line evidences this insufficiency.
[15] The Claimant attempted to stop payment on the check, but it had already been endorsed to the Respondent's company and deposited in his account.
[16] Forwarding an email from Ameriprise sent to the Claimant on April 22, 2016, when he forwarded it to her attorney the same day, Ameriprise had sent three independent adjusters to inspect the Claimant's house (Clmt. Ex. 15). Although the email was dated April 22 2016, the Claimant makes reference to an inspection performed in "Aug 2016."

the hearing indicating what work Seterus or its inspectors believed to have been completed and what work remained to be done.[17]

There was also conflicting evidence regarding the $10,150.40 check. When Seterus prepared and mailed the check payable to both the Claimant and Respondent, there was a dispute between the parties as to how the check would be handled. As the check was payable to both the Claimant and the Respondent, the Claimant testified that the Respondent said that he needed it for his workers, which the Respondent denied. The Respondent rightly said that the money was supposed to pay for insurance-authorized repairs.

There was some discussion about whether the Claimant would sign the check over to the Respondent, and whether the Respondent would have used the proceeds of that check for the kitchen, basement or siding repairs; the latter is what the insurance check was intended for; without any idea of the scope and price of the basement and kitchen work, it is impossible to know what if any money was owed him to see if any of those funds were used in this manner.

The Claimant had already been paid $2,000.00 for the roofing and tree removal, work which neither appears to be at issue nor the basis for that check. The insurer's and mortgage company's damage repair payment process that the Respondent described seems to have provided the Claimant with payment on the repair work that was done prior to the Respondent's work on the siding - roofing, ceiling, anti-microbial, painting, etc. The funds to pay for those items were apparently sent to the Claimant and her insurer, held in the insurer's escrow account, and released to the Claimant after the inspection took place. The Respondent conceded that he did not start that siding work at that time, choosing instead to perform interior work while the Claimant was out of the country. He testified, however, that he did perform

[17] If this was not the case, the Claimant, who has the burden of proof in this case, could have proven otherwise. Although the OAH issued a subpoena to Seterus under its new name, "Mr. Cooper" (necessitating a third day of hearing), no such probative documents were produced.

other storm-related, insured work, a fact supported by Seterus' release of the $10,150.40 check after Safeguard's inspection

Kitchen work

The Respondent provided a long explanation of what home improvement work was to be done in the kitchen - granite countertops, specific type of wood for the cabinets, and adjustments for changes that the Claimant would make to the cabinet requirements. Nevertheless, there is no written contract, no change orders, and little way of tracking what was done, what was not done, what was paid for, and what needed to be completed. Without a contract, there is no proof what work was supposed to be done, and if it was done, whether the work was done correctly (i.e., there was no written agreement to determine the scope of the work).

The Claimant presented pictorial evidence of the work that she claimed was left incomplete (Clmt. Ex. 3 A through K). However, the photographs were not probative (i.e., it was unclear as to when they were taken - during the construction, after the construction ended, after any further manipulation of the cabinets, dishwasher, stove, etc.). Many of the photographs appear to have been taken while the work was in progress, and not at its completion. For example, Clmt. Ex 3E shows someone measuring a cabinet – was this one of the Respondent's workers who was still on the job, or was it a witness who could have been presented to testify about the condition of the property after the Respondent left the job? Claimant Ex. 3G shows tools in the kitchen – were these left on the jobsite or was this picture taken during construction, which would show the work as it progressed? Clmt. Ex. 3J appears to show a dishwasher removed from under the counter. But in Clmt. Ex. 3L, the dishwasher

appears to be in place under the counter – how could the dishwasher be both under and not under the counter after the Respondent let the job site? The Claimant complained of damage to her dishwasher, but without any indication of the scope of work, it is difficult to determine whether the dishwasher was moved, as claimed by the Claimant, or not moved, as claimed by the Respondent, who testified that moving the dishwasher was beyond the scope of work he was to have performed (again, the confusion created by not having a contract from which the scope of work could be determined).

The Respondent admits that the work was not completed, but it was because he was not permitted to finish his work; he also showed examples (some of which were discussed above) of how the pictures were taken while the work was progressing. These pictures tell an inconsistent story about the condition of the property when the Respondent left the job site and do not support a clear picture of what was left undone.

Basement work

Similarly, the Claimant alleges that the Respondent did incomplete, inadequate and unworkmanlike home improvement in the basement, claiming that Clmt.Ex. 3N through T show that work. As mentioned above with regard to the kitchen work, without a contract stating the scope of work, it is not possible to determine whether the work was incomplete. Moreover, the Claimant's allegations that the work was inadequate and incomplete suffers from the same deficits as did the kitchen claim – there was no independent assessment of whether the work was acceptable in the trade, and whether the Respondent was permitted to complete the work, as discussed below.

Abandonment

The Claimant presented a copy of two text messages she sent to the Respondent (Clmt.Ex. 5). The first was purportedly sent on September 21, 2016,[18] advising the Respondent of the following (verbatim transcript):

> Good morning,
> George I want my kitchen and the remaining finishes in my basement done by friday. After Friday I will no longer continue..done or undone. Kindly try and put my house phone which has been out for 2 months back by then Please remember to come with your check back, I will need to $10,000 for my exterior work. For the kitchen and the electricals, we need first things today to reconcile the account..since for almost 2 months the cabinets are not in, pls do not order any more at this stage I can no longer afford to new ones.

The next text message, which is confusing at best, appears without a date, although September 23, 2016,[19] is again handwritten on the top of the page:

> I take it that we are done..however accounting needs to be made as u have also claimed that I have not more bills... I house is trashed, my carpet stained..i tried to vacuum it out but not successful. your work site not clean out, as usual I left to clean up after u. Thanks but I am done.. For the $10,000 let me know when you get the return and the type of instrument they sent. I will have to send it back or ask for a stop payment (depending on what was returned) Thanks and have a goodnight

The significance of these text messages is twofold. First, these messages represent a unilateral, unreasonably short opportunity to cure (in two days). There is insufficient data to determine whether the Appellant got the message, what was contracted to be done, what was left to be done, or what the Respondent's reaction to these messages was. Moreover, the reference to the financial arrangements between the parties fails to clarify what amounts were transacted between the parties, what the Respondent was paid to do, or any basis for me to determine the status of the $10,000.00 payment (assuming that it references the $10,500.40 check from Seterus).

[18] The text message has no date stamp – only a written explanation. If this is the correct date, it is a Wednesday.
[19] This date is a Friday.

The only other written communication appears to be written to the Respondent by an attorney, Patrick Tachie-Menson, on behalf of the Claimant on October 20, 2016 (Clmt. Ex. 8). That letter, entitled "Notice of Non-Compliance," sought recovery of the $10,050.45 made payable to both parties and deposited in the Respondent's account. The only incomplete home improvement work referenced in that letter was the replacement of vinyl siding; no reference was made to any work in the kitchen or basement.

The Respondent asserts that he wanted to complete the work, and that he was going to file a supplemental claim for additional work that he discovered needed to be done. But the deficits in the kitchen and basement were not reduced to writing so that the parties would know what the Claimant thought had to be done. The Claimant, in merely telling the Respondent that he was fired without giving him a reasonable opportunity to correct or clean up deficiencies, did not allow a reasonable opportunity to cure, which is required. "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." Bus. Reg. § 8-405(d). Because the Claimant never gave the Respondent a reasonable opportunity to make good faith efforts to resolve the claim, her claim is barred.

Fund award

Even if there were a contract and a recognizable agreement as to the scope of the work to be done, intermingling of work scope and comingling of insurance payments further complicates the calculation of an award from the Fund. The Claimant seems to have comingled the funds for the siding repair and the contracted kitchen and basement work, making it difficult to determine what funds the Respondent was paid, from what source, and for what work.

Furthermore, there was no documentation showing what work was to be done in the kitchen or basement, or the agreed-upon cost of that work. Even if I were to have accepted that the work was performed aesthetically different from how the Claimant believed it should have been performed, there was no evidence that the work was not performed within the standards of a contractor

There was no testimony from a licensed contractor explaining whether the work was done within the standards of the trade, the items that needed to be repaired or replaced, and whether any of the work can be salvaged. The Claimant submitted into evidence an estimate from Beltsville Paving dated June 20, 2017, which was written almost three quarters of a year after the Respondent's last presence at the Claimant's house (Clmt. Ex. 6). The Claimant could not remember the name of the person who gave the estimate or how that company came to her attention, other than it was a recommendation from some unidentified individual. The "estimate" is sparse, and includes only minimal detail.[20]

The work that Beltsville Paving advertises on its work agreement seems far afield from the work required in the present case: "Specializing in driveways, parking areas, patching seal coating & grading, commercial and residential." Accordingly, Beltsville Paving's estimate is unconvincing as to the condition of the property, the quality of the work, and the cost to correct any identified deficits. Accordingly, I give this estimate no weight.

Even if I were to find the parameters of a contract for the kitchen and basement work, and even if I were to determine that the Respondent did not perform work on the siding, Beltsville Paving's estimates did not adequately establish the value of the work that was

[20] "1 Basement - repair drywall areas – re-paint – replace door
2 Exterior – remove and replace all siding
3 Kitchen – replace (4) cabinets, replace garbage disposal, [illegible] molding; repair cabinet, replace connection for dishwasher." The price for each element of the work was listed in the estimate as $1,000.00, $11,500 and $4,500.00, respectively.

performed and the cost to complete the work, all of which are essential to determining a Fund award. COMAR 09.08.03.03B(3).

Conclusion

The Respondent testified that he looked at the entire project as a single project, but nevertheless he only had one contract written for the siding - all of the other work was not reduced to a written contract. Although I find the Respondent culpable for not reducing to writing any agreement regarding the kitchen or basement work, the Claimant is equally culpable for her acquiescence; she has the burden of presenting her claim and has failed to meet that burden. Although I did not find the Respondent totally credible with regard to his dealings with the Claimant, and particularly because he failed to reduce their agreement (other than the storm-related insurance repairs) into a written contract, the burden is on the Claimant to prove the contract, including the scope and cost of the contract, in order to prove her claim. Even if the contract terms were satisfactorily proven, the Claimant's case is complicated by the intermingling of money from the insurance proceeds - it is as if the Claimant was attempting to finance her basement and kitchen repairs with insurance proceeds, which makes separating out the various contract claims impossible. Moreover, the weight indicates that Safeguard was satisfied that work valued at $10.150.40 had been completed, which is why it advised Seterus to release those funds; there is little credible evidence presented by the Claimant to show that $10,150.40 worth of work was not performed, which is the Claimant's burden to prove.

I find that the Claimant has failed to prove an actual loss and is, therefore, ineligible for any compensation from the Fund.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss 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(3).

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

July 29, 2019
Date Decision Issued

Marc Nachman
Administrative Law Judge

MN/kdp
180153

PROPOSED ORDER

WHEREFORE, this 10th day of September, 2019, 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.

Wm. Bruce Quackenbush

Wm. Bruce Quackenbush
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION