

IN THE MATTER OF THE CLAIM	* BEFORE MARY PEZZULLA,
OF JOHN KOCOVINOS,	* 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 KRAIG REBSTOCK,	* OAH No.: LABOR-HIC-02-19-40203
T/A KER REMODELING,	* MHIC No.: 18 (90) 1171
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On April 2, 2019, John Kocovinos (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$28,357.03 in actual losses allegedly suffered as a result of a home improvement contract with Kraig Rebstock, trading as KER Remodeling (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On December 9, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on May 21, 2020 via the video conferencing platform Google Meet,¹ which was subsequently continued to and concluded on July 9, 2020 at an in-person proceeding at the OAH in Hunt Valley, Maryland.² Bus. Reg. § 8-407(e). Hope Sachs, Assistant Attorney General, Department of Labor (Department),³ represented the Fund. The Claimant represented himself. Russell Bennett, Esquire, represented the Respondent during the first day of the hearing on May 21, 2020 hearing; however, Mr. Rebstock represented himself and KER Remodeling during the second and final day of the hearing on July 9, 2020.⁴

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. 2019); 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?

¹ This matter was originally scheduled for a hearing on May 21, 2020 at 10:00 a.m. at the Tawes State Office Building in Annapolis, Maryland. However, due to the ongoing COVID-19 pandemic, beginning March 23, 2020, the OAH suspended all non-emergency, in-person hearings through April 3, 2020. The OAH then extended this suspension of in-person hearings through June 5, 2020. I convened a telephone conference (Conference) with the parties in this matter on May 13, 2020. At that Conference, the parties agreed to proceed with the scheduled hearing on May 21, 2020 via the Google Meet platform.

² At the start of the hearing on May 21, 2020, Mr. Bennett, on behalf of the Respondent, made a motion to dismiss, which was opposed by the Claimant and the Fund. I denied the motion pursuant to Code of Maryland Regulations (COMAR) 09.01.03.05.

³ On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

⁴ Mr. Bennett filed a line to strike his appearance in this matter on June 22, 2020. Mr. Rebstock provided an executed Special Power of Attorney permitting him to represent KER Remodeling for the continuation of the proceeding.

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 - Timeline of events and summary of complaints prepared by the Claimant, undated
- Clmt. Ex. 2 - Contract between the Claimant and the Respondent, dated November 15, 2017
- Clmt. Ex. 3 - Drawing of kitchen for cabinet installation, undated
- Clmt. Ex. 4 - Drawing of kitchen for cabinet installation with various handwritten notes, provided to the Respondent by the Claimant, October 18, 2017
- Clmt. Ex. 5 - Check from the Claimant to the Respondent in the amount of \$15,000.00, dated November 20, 2017; check from the Claimant to the Respondent in the amount of \$1,600.00, dated December 8, 2017
- Clmt. Ex. 6 - Check from the Claimant to the Respondent in the amount of \$7,500.00, dated December 20, 2017
- Clmt. Ex. 7 - Check from the Claimant to P.T.D Custom Builders Inc.⁵ (P.T.D.) in the amount of \$6,000.00, dated January 6, 2018; check from the Claimant to P.T.D. in the amount of \$3,137.09, dated January 21, 2018
- Clmt. Ex. 8 - Check from the Claimant to P.T.D. in the amount of \$1,870.00, dated January 29, 2018; check from the Claimant to P.T.D. in the amount of \$1,964.94, dated February 3, 2018
- Clmt. Ex. 9 - Check from the Claimant to P.T.D. in the amount of \$1,870.00, dated February 22, 2018
- Clmt. Ex. 10 - Check from the Claimant to Dennis Harris in the amount of \$1,100.00, dated February 3, 2018
- Clmt. Ex. 11 - Invoice from Harris Contracting, Flooring and Home Inspection to the Claimant, dated March 19, 2018
- Clmt. Ex. 12 - Letter from P.T.D. to the Claimant, dated December 28, 2017; Time and Materials Contract between the Claimant and P.T.D., signed December 29, 2017

⁵ Various exhibits refer to P.T.D. Custom Builders Inc. as either P.T.D. or P.T.D. Customer Builders. All such references are to the same company. For purposes of this decision, P.T.D. Custom Builders Inc. shall be referred to as P.T.D.

Clmt. Ex. 13 - Home Inspection Report prepared by Morrison Homes Inspection Services, dated August 16, 2018

Clmt. Ex. 14 - Not admitted

Clmt. Ex. 15 - Resume of Paul T. Dickover, undated

Clmt. Ex. 16 - Photographs numbered 1-29, taken by the Claimant between December 2017 and January 2018

Clmt. Ex. 17 - Photographs numbered 1-80, taken by the Claimant between December 2017 and January 2018

Clmt. Ex. 18 - USG Sheetrock Brand Installation and Finishing Guide, undated

Clmt. Ex. 19 - Wolf Home Products Cabinetry Installation Guide, undated

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

Resp. Ex. 1 - Photograph of the Claimant's kitchen, taken by the Respondent in December 2017

Resp. Ex. 2 - Photograph of the Claimant's kitchen, taken by the Respondent in December 2017

Resp. Ex. 3 - Photograph of the Claimant's kitchen, taken by the Respondent in December 2017

Resp. Ex. 4 - Photograph of the Claimant's kitchen, taken by the Respondent in December 2017

Resp. Ex. 5 - Photograph of the Claimant's kitchen, taken by the Respondent in December 2017

Resp. Ex. 6 - Photograph of the Claimant's kitchen, taken by the Respondent in December 2017

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notice of Hearing, dated February 25, 2020

Fund Ex. 2 - MHIC Hearing Order, dated December 2, 2019

Fund Ex. 3 - Telephone Prehearing Conference Report and Scheduling Order, dated May 14, 2020

Fund Ex. 4 - Respondent's Licensing Records, printed May 18, 2020

Fund Ex. 5 - Home Improvement Claim Form, received April 3, 2019

Fund Ex. 6 - Letter from MHIC to Respondent, dated April 4, 2019

Testimony

The Claimant testified and presented the testimony of the following witnesses: Paul Dickover, President and Owner of P.T.D., who was accepted as an expert in kitchen remodeling, sheetrock installation, cabinet installation, and tile installation; Dennis Harris, who was accepted as an expert in floor installation; and Daniel Morrison, who was accepted as an expert in home inspections and home building.

The Respondent testified and presented the testimony of Gary Broseker and Eric Randall.

The Fund did not offer any testimony.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 5500512.
2. The Claimant is the owner of a home located at 1525 Puffin Court in Pasadena, Maryland. The Claimant owns one other property in Maryland, but the Puffin Court home is his primary residence.
3. On November 15, 2017, the Claimant and the Respondent entered into a contract to renovate the kitchen in the Claimant's home (Contract). The Contract provided for the removal of all of the existing cabinets in the kitchen and the installation of twenty-two new cabinets. It also included removing existing kitchen walls and ceiling in order to create a

cathedral ceiling, as well as installing granite countertops, a new jumbo sink, hardwood flooring, baseboards, and crown molding.

4. The original agreed-upon Contract price was \$34,000.00 to be paid in three draws in the amounts of \$15,000.00, \$10,000.00, and \$9,000.00.

5. On a date unclear in the record, the parties amended the Contract price to \$36,600.00 to add \$1,600.00 to move a plumbing line away from an electrical panel and \$1,000.00 for attic insulation.

6. The Claimant paid the Respondent the following amounts: \$15,000.00 on November 20, 2017; \$10,000.00 on December 8, 2017; \$1,000.00 on December 14, 2017; \$1,600.00 on December 8, 2017; and \$7,500.00 on December 20, 2017.

7. Work began on the kitchen remodel on approximately December 4, 2017, with the demolition of the existing kitchen.

8. The Claimant met with the Respondent almost every morning to discuss the project. During these meetings, the Claimant complained of issues and problems that he noticed as the project progressed, such as cabinets and crown molding hung crookedly; cabinets not installed per the drawing or agreed-upon layout; cabinets damaged, bent or scratched; lights flickering; scratches on the newly installed hardwood floor; and uneven installation of the backsplash tiles -. The Respondent responded that the Claimant was being too picky, that nothing could be perfect, and that he was losing money on this project. The Respondent did not address these issues and as the project continued, the number of unaddressed issues continued to mount.

9. On December 19, 2017, the Claimant called the Respondent and informed him that he no longer wanted KER Remodeling to continue with the project.

10. On December 20, 2017, the Respondent and his workers returned to the property to clean up and collect their tools and equipment. At this time the Claimant paid the Respondent \$7,500.00 and the Respondent indicated on the original Contract that the "Homeowner Paid In Full." (Clmt. Ex. 2).

11. On or about December 28, 2017, the Claimant hired Paul Dickover of P.T.D., MHIC license number 23948, to evaluate the kitchen in order to ascertain what still needed to be done and whether any of the work done by the Respondent could be corrected. Mr. Dickover noted numerous deficiencies in the kitchen remodel, including, but not limited to: cabinets not installed level, installed out of plumb (i.e., not straight), and not installed securely and therefore undulating; the new wall framing out of plumb with the existing wall surface; a missing toe kick spacer at the base of one cabinet; the drywall ceiling finish was still rough, although it had already been primed; caulking was used on drywall junctions instead of tape and mud; the tile backsplash was improperly installed and was therefore not smooth or level and had uneven gaps between the tiles; cabinet fillers were not installed at the base of cabinets; no hardware had been installed on the cabinets; and the refrigerator door would not open due to being blocked by a countertop that had been improperly installed.

12. The Claimant hired P.D.T. to correct the deficiencies and paid P.D.T a total of \$14,842.03 to repair the work done by the Respondent and to complete the kitchen remodel. This included removing all of the cabinets that had been installed and reinstalling them in a level and plumb fashion. P.D.T. did not perform any work outside of the scope of the Claimant's Contract with the Respondent.

13. The Claimant also hired Dennis Harris, a certified home inspector, to look at his kitchen to determine any deficiencies. In addition to the issues noted by P.T.D., Mr. Harris

observed that the hardwood flooring installed by the Respondent was out of square and he noted irregular gaps between the hardwood planks. Mr. Harris is not MHIC licensed, although he is licensed to complete home inspections. The Claimant paid Mr. Harris \$1,100.00 to work along with P.D.T. to help repair the kitchen.

14. The Claimant also hired Morrison Homes Inspection Services (Morrison Homes) to complete a home inspection report (Report). Morrison Homes completed the inspection of the kitchen on August 16, 2018. Among other things, the Report noted that the HVAC in the kitchen was poorly installed, specifically a desk was installed blocking a HVAC vent, preventing airflow, and not installed to code; and there were safety issues with the electrical work, and he could not find any permits issued for the electrical work.

15. The Claimant has not filed any legal proceedings against the Respondent arising from the Contract and has not filed any insurance claim related to the Respondent's work.

16. The Claimant is not related to the Respondent, is not an employee or business associate of the Respondent, and is not related to an employee or business associate of the Respondent.

DISCUSSION

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). "[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)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 proven eligibility for compensation.

The Respondent was a licensed home improvement contractor under MHIC license number 5500512 at the time he entered into the Contract with the Claimant. The Respondent performed unworkmanlike, inadequate or incomplete home improvements regarding the remodeling of the Claimant’s kitchen. The Claimant testified that in October and November 2017, he met with Gary Broseker, the cabinet supplier, to finalize a drawing and plans to have new cabinets installed in his kitchen as part of a full kitchen renovation and remodeling. On November 15, 2017, the Claimant signed a contract with KER Remodeling to complete the kitchen renovations. The Claimant provided the Respondent with the kitchen plans finalized with Mr. Broseker. The original Contract price was \$34,000.00. This amount included demolition work in the kitchen, including the removal of the existing cabinets, the purchase and installation of twenty-two Wolf cabinets, granite countertops, the removal of existing kitchen walls and ceiling in order to create a cathedral ceiling, and the installation of granite countertops, a new jumbo sink, hardwood flooring, baseboards, and crown molding.

The Contract specified three draws in the amounts of \$15,000.00, \$10,000.00 and \$9,000.00. The Claimant testified and presented evidence that he actually made five payments to

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

the Respondent: \$15,000.00 on November 20, 2017; \$1,600.00 on December 8, 2017; \$1,000.00; on December 14, 2017; and \$7,500.00 on December 20, 2017. The Claimant explained that the \$1,000.00, which was paid in cash on December 14, 2017, was to pay for the installation of insulation in the attic, as part of the attic had been removed in order to create the cathedral ceiling in the kitchen. The Claimant also testified that he paid \$1,600.00 to the Respondent via check for plumbing work, including fixing or moving a plumbing line that the Respondent put in that ran immediately next to an electrical panel. He testified that these amounts were in addition to the Contract amount of \$34,000.00.

The Claimant explained that the last payment he made to the Respondent was on December 20, 2017 in the amount of \$7,500.00. He testified that on December 19, 2017, he called the Respondent to tell him that the project was not working out, he was unhappy with the work and the Respondent's attitude toward the project, and the Respondent should come to the house on December 20, 2017 to clean up and gather his tools and equipment. During this conversation, the parties agreed that the Claimant would make a final payment to the Respondent in the amount of \$7,500.00. On December 20, 2017, the Respondent wrote on the Contract "Homeowner Paid In Full" and the Claimant wrote on his check "Paid In Full Kitchen." (Clmt. Ex. 2 and Clmt. Ex. 6). The Claimant testified that by writing "Paid In Full" on the documents he believed that to mean that he did not owe the Respondent any additional money, but not that the matter was fully settled since he was unhappy with the work done on the kitchen remodel.

The Claimant stated that he had found the Respondent through the website Home Advisor but began having issues with him once the job started. Demolition of the existing kitchen began on the kitchen on December 4, 2017 and the new cabinets arrived on or about December 8, 2017. The Claimant spent a significant part of his testimony discussing how the

cabinets were then placed in the garage and that the Respondent's plumber caused a leak, which flooded the garage and damaged the cabinets. However, it was clear from the Claimant's testimony and the testimony of Mr. Broseker that any such damage to the cabinets was corrected by the cabinet maker, through Mr. Broseker. As the damage to the cabinets was fixed or the cabinets replaced, the Claimant did not suffer a loss on this issue. I believe the Claimant was using the example of the damage to the cabinets to show that he did not have a good relationship with the Respondent.

The Claimant testified that from the beginning of the project he met almost daily with the Respondent to go over the work that had been completed so far. During these morning conversations, the Claimant pointed out issues with the project that he wanted corrected. The Claimant explained that some of these issues included that some of the cabinets appeared to be hung crookedly, insecurely, and not according to the drawings. He also advised the Respondent that the backsplash looked sloppy and uneven. In addition, the Claimant discussed with the Respondent the mess that he was leaving at the end of each day, and that it appeared that objects were being cut on the newly installed granite countertops, causing scratches and marks. The Claimant also indicated to the Respondent that work debris was causing scratches to the newly installed hardwood flooring. The Claimant did not testify to the exact date that each conversation occurred with the Respondent, but explained that he spoke to the Respondent almost every morning of the project, going into work late in order to meet with him, and that the Respondent was dismissive of his complaints. The Claimant testified that the Respondent told him that he was being too picky or particular, and that the Respondent was losing money on the job. The Claimant maintained that the Respondent did not correct the issues the Claimant addressed with him and as each day of the project progressed, his list of complaints grew.

The Claimant stated that by December 19, 2017, he felt that the Respondent had been dismissive of his concerns and would continue to ignore the growing list of concerns and issues that the Claimant related to him. Because of this, the Claimant called the Respondent on December 19, 2017 and explained that he was not satisfied with the work performed and he would get someone else to finish the job. The Claimant testified that the Respondent replied he "saw it coming." He explained that although the Respondent had never threatened him or cursed at him, the situation was tense and so he decided to stay home from work the next day to oversee the Respondent's departure and to provide him with his final payment. The Claimant further explained that he did have more communication with the Respondent after December 20, 2017, via phone, but he never asked the Respondent to come back to the house and make any additional repairs.

He testified that as the Respondent never addressed or fixed any of the issues he brought to the Respondent's attention, he saw no point in continuing the relationship. In order to rectify the problems with the Respondent's work and to complete the project, the Claimant hired P.T.D. The Claimant testified and presented evidence (Cl. Exs. 7-9) that he paid P.T.D. a total of \$14,842.03 to fix the problems and complete the project. He also hired Dennis Harris to help P.T.D. with the work and paid Mr. Harris \$1,100.00. Finally, in August 2018, the Claimant had a Home Inspection Report prepared by Morrison Homes. This report details the existing plumbing and electrical issues in the home that were caused by the Respondent's work. (Cl. Ex. 13).

The Claimant presented the testimony of Paul Dickover, President and Owner of P.T.D., who was accepted as an expert in kitchen remodeling, sheetrock installation, cabinet installation, and tile installation. Mr. Dickover's testimony was detailed, thorough, and easy to understand.

He explained that he was contacted by the Claimant in December 2017 to look at his kitchen and provide an assessment of the work that had been done by the Respondent and what was needed to complete the project. Mr. Dickover performed the assessment on December 28, 2017; he noted numerous deficiencies and issues, which he outlined in a letter dated December 28, 2017. (Cl. Ex. 12; *see* Finding of Fact No. 11).

Mr. Dickover testified that he is familiar with Wolf Home Products Cabinetry Installation Guide (Cl. Ex. 19) and that in his opinion, the cabinets were not installed properly, pursuant to the installation guide. He explained that to properly hang the cabinets, the Respondent should have located the “high spot” in the room in order to put in a level line to represent the line at the base of the cabinets. He should have also “read the wall” and “[found] the bumps or highs or lows” so these issues could be addressed, and the cabinets hung level and plumb. Mr. Dickover further explained that one wall in the kitchen has an existing bulge, which was ignored and not addressed when the cabinets were installed, which also caused the cabinets to be installed unevenly. Mr. Dickover opined that it appeared to him that the Respondent did not use clamps, shims, or a level, and if he did, he did not use them properly.

Mr. Dickover also testified that the sheetrock in the kitchen was not properly installed per the USG Sheetrock Brand Installation and Finishing Guide (Cl. Ex. 18). He explained that caulk was used on the inside corners and angles of the drywall, which is not typical or workmanlike because it can crack and peel. Mr. Dickover referred to photographs 36, 37, 38, and 43 in Claimant Exhibit 17, which show the caulk peeling and cracking and pulling away in large pieces.

Finally, Mr. Dickover explained that the issues he outlined in his December 28, 2017 letter were not merely minor issues that would normally be left to the end of a project and then

completed as part of a punch list. He explained that the issues that led to the cabinets being hung unlevel, out of plumb, and unstably should have been corrected at the time of installation. He testified that the "field conditions," meaning, in this case, the kitchen and the bulge in the kitchen wall, drive the final placement of the cabinets and that an installer should not just "squeeze them into position." Mr. Dickover opined that the installation of the cabinets and drywall, as well as the tile work, were done in an unworkmanlike and improper manner.

The Claimant also offered the testimony of two additional expert witnesses: Dennis Harris, who was accepted as an expert in floor installation, and Daniel Morrison, who was accepted as an expert in home inspections and home building. Although Mr. Harris is a licensed home inspector, he is not licensed to perform home improvement work by the MHIC. However, this did not diminish Mr. Harris' knowledge and expertise gained over twenty-seven years in the areas of floor installation and home inspection. Mr. Harris stated that after inspecting the Claimant's kitchen it was immediately apparent that either the floor was out of square or the cabinets were out of square with the floor. Either way, the only way to correct this issue would be to pull up a piece of the flooring to verify whether the issue was in the flooring. He also observed irregular gaps in the wood flooring. Mr. Harris explained that these gaps were not linear, which could be normal to allow for expansion or contraction of the wood, but were instead present at the butt joints. He noted that these gaps would be neither easy nor inexpensive to correct. Mr. Harris opined that these gaps indicate unworkmanlike installation of the wood flooring. He was also clear in his testimony that such deficiencies should have been immediately corrected and were not something that should be left until the end of a project to rectify.

Mr. Morrison testified that he completed a home inspection on August 16, 2018. He explained that when he performs an inspection, he checks with the county to make sure that any

permits were properly issued. In this case he found no such permits for any of the work done in the Claimant's kitchen. Mr. Morrison noted that outlets were exposed and improperly installed. He also noted that the HVAC in the kitchen was poorly installed, specifically a newly installed desk/cabinet blocked a HVAC supply vent, which prevents airflow. In addition, another HVAC vent under a cabinet was blocked and should have had a boot extension; without the extension, he estimated that forty to sixty percent of the air from that vent was being blocked. He testified that this "red flagged" him, because it was so obviously poorly done. Mr. Morrison also noted that the plumbing under the sink next to the dishwasher should have included a loop in the drain to prevent fumes and prevent gasses from building up. It was Mr. Morrison's opinion that these deficiencies were due to the work being performed in an unworkmanlike manner.

The Respondent presented the testimony of Gary Broseker, who met with the Claimant and his wife in October 2017 to discuss what kind of cabinets they wanted for their kitchen and took measurements based on what was going to be removed and what was going to be replaced. Mr. Broseker purchased the cabinets from the supplier, Wolf Home Products, and then the Respondent purchased the cabinets from him. Mr. Broseker testified that he has seen the Respondent do approximately fifty kitchen remodeling jobs, and he visited the Claimant's home while the remodeling was happening several times and nothing seemed out of order to him. Mr. Broseker was clear that while he did not install the cabinets, he did not see anything wrong with the cabinet installation that "jumped out" at him.

The Respondent also presented the testimony of Eric Randall who was a carpenter's helper on this kitchen remodeling project. He testified that on this project the Respondent used shims and clamps and levels and squares and always cleaned up at the end of the day. He

testified that he helped to hang the cabinets and that they were level. According to Mr. Randall, he did not see anything that did not look right in the kitchen.

Finally, the Respondent testified. He stated that the Claimant was "very particular" and that every day the Claimant was showing him things that needed to be done and that every day there were more items. The Respondent testified that during his phone call with the Claimant on December 19, 2017, he told the Claimant that he wanted to finish the job because there was "very little" left to do and it was really just punch list items that had to be completed, but that the Claimant refused. The Respondent stated that he thought the kitchen remodel "looked good" and that it was one of the better kitchens that he had done. The Respondent testified that he believed the project was ninety to ninety-five percent completed at this point and offered a photograph (Resp. Ex. 5) in support.

On cross-examination, he was adamant that he did not see any gaps in the wood flooring when he was there, but such gaps are not hard to correct. He admitted that the corner of one of the countertops prevented the refrigerator from opening, but again insisted that it would be a minor issue to correct. He also stated that if he had been permitted to stay on the job, he could have also corrected the issues regarding the blocked HVAC vents.

I found the Respondent's testimony to be self-serving and selective as to how he remembered the situation. In reviewing the over one hundred photographs that the Claimant entered into evidence in Claimant Exhibits 16 and 17, as well as the photographs in the Home Inspection Report (Cl. Ex. 13), it is difficult to believe that the Respondent is referring to the same project and work. The photographs show obviously uneven tile with gaps and uneven spacing (Cl. Ex. 17, photos 44-48), uneven and unlevel cabinets (*Id.*, photos 22-24), cracked and peeling caulking (*Id.*, photos 33-43), gaps between the wooden flooring (*Id.*, photos 69-74), a

cabinet blocking the refrigerator door from opening (*Id.*, photo 63), and blocked HVAC vents (*Id.*, photos 66-67). In one of the Respondent's own photographs (Resp. Ex. 4), it is clear that one cabinet is installed so far back over the refrigerator as to be inaccessible. When directly asked about this cabinet on cross-examination, the Respondent replied that it looked flush with the refrigerator to him. It clearly is not.

Additionally, I am persuaded by the testimony of the Claimant's three expert witnesses that the deficiencies in the kitchen remodel were the result of poor and unworkmanlike work performed by the Respondent. Likewise, I credit the expert testimony that the deficiencies were not minor, easily fixed, or repairs that constituted punch list items to be left to the end of the project to correct. The testimony of all three experts agreed that the noted deficiencies were not easy or quick fixes. I give no weight to the Respondent's testimony that he was essentially finished with the job and the Claimant would not permit him to come back and finish the remaining couple of days' worth of work. I find the ample documentary evidence submitted by the Claimant, as well as the testimony of his three expert witnesses, supports the conclusion that the Respondent performed in an unworkmanlike fashion during this kitchen remodeling project.

Both the Claimant and Respondent agreed that they met almost every day to discuss the project and that at almost every one of these meetings, the Claimant brought issues to the Respondent's attention. It is clear from the testimony of the experts and the photographic evidence that the Respondent ignored the Claimant's complaints and never rectified the deficiencies brought to his attention throughout the project. Because of this, I find it reasonable that the Claimant had no confidence that the Respondent would complete the home improvement project in a workmanlike manner and was therefore justified in seeking other contractors to complete the work. The Claimant did not reject any good faith efforts by the Respondent to

complete the project, as the Respondent's actions throughout the project, specifically in not addressing issues as the Claimant brought them to his attention, demonstrated that the Respondent was not performing the home improvement in a workmanlike manner.

Finally, I find that the Claimant's noting his last check to the Respondent as "paid in full" does not preclude the Claimant from pursuing a claim in this matter. This is a not a breach of contract matter. The issue before me is whether the Claimant sustained an actual loss compensable by the Fund as a result of the Respondent's acts or omissions. I do not find that this was a financial agreement between the parties to resolve all possible claims; rather, as the Claimant testified, it merely reflected that he did not owe the Respondent any additional money under the Contract. The Claimant was clear in his dealings with the Respondent, and clear in his testimony, that he was unhappy throughout the project with the work performed by the Respondent and the Respondent's failure to address issues and deficiencies as they arose.

I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is 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.

In this case, the Respondent performed some work under the contract, and the Claimant retained other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's 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).

My next inquiry is what expenses in the estimates to remedy the work is the Claimant entitled to. The Fund submitted, and I agree, that I should include in my calculation the total amount paid by the Claimant to P.T.D., which was \$14,842.03, as the scope of the work performed by P.T.D. was the same as was to be performed by the Respondent pursuant to the Contract. The Fund argued that I should not include the \$1,100.00 paid to Mr. Harris for his work, as Mr. Harris is not a licensed home improvement contractor with the MHIC. I agree that it is against public policy to allow a claimant to recover from the Fund for repairs that were performed by an unlicensed contractor. Additionally, while the Claimant testified that he has still not corrected all the deficiencies and unworkmanlike home improvements performed by the Respondent, he did not provide any estimates for the completion of this remaining work. As no estimates were provided, I cannot consider the cost to correct any still-existing deficiencies.

Therefore, under COMAR 09.08.03.03B(3)(c), I find the "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" to be

\$14,842.03. Next, I find the amount the Claimant paid to the Respondent is \$35,100.00.⁷

Therefore, the Claimant's actual loss, using the formula above, is \$13,342.03.⁸

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 Claimant's actual loss is less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled to recover his actual loss of \$13,342.03.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss \$13,342.03 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015). I further conclude that the Claimant is entitled to recover that amount from the Fund. Bus. Reg. § 8-405(a), (d) (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$13,342.03; 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

⁷ The Claimant paid the Respondent the following amounts: \$15,000.00 on November 20, 2017; \$10,000.00 on December 8, 2017; \$1,000.00 on December 14, 2017; \$1,600.00 on December 8, 2017; and \$7,500.00 on December 20, 2017. (\$15,000.00 + \$10,000.00 + \$1,000.00 + \$1,600.00 + \$7,500.00 = \$35,100.00).

⁸ The amount paid to the Respondent is \$35,100.00. The amount paid to other contractors to correct and complete the work is \$14,842.03. The amount of the amended Contract is \$36,600.00. \$35,100.00 + \$14,842.03 = \$49,942.03. \$49,942.03 - \$36,600.00 = \$13,342.03.

under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission⁹; and

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

September 18, 2020
Date Decision Issued

MP/kdp
186040

CONFIDENTIAL

Mary Pezzulla
Administrative Law Judge

⁹ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 2nd day of November, 2020, 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.

Michael Newton

Michael Newton

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***