IN THE MATTER OF THE CLAIM	*	**BEFORE KATHLEEN A. CHAPMAN,**
OF JONATHAN JETT-PARMER,	*	**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 FRANK ZEBERLEIN,	*	
T/A RUXTON DESIGN & BUILD,	*	**OAH No.: LABOR-HIC-02-19-24174**
LLC,[1]	*	**MHIC No.: 18 (05) 581**
RESPONDENT	*	

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

PROPOSED DECISION

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STATEMENT OF THE CASE

On May 21, 2018, Jonathan Jett-Parmer (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $20,000.00 in actual losses allegedly suffered as a result of a home improvement contract with Frank Zeberlein, trading as Ruxton Design & Build, LLC (Respondent). Md. Code Ann., Bus.

[1] The Respondent is currently operating under the business name of Ardent Home Improvement, LLC.

Reg. §§ 8-401 through 8-411 (2015).[2] On July 26, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on February 13, 2020 at OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e). Shara Handler, Assistant Attorney General, Department of Labor (Department),[3] represented the Fund. Patrick McKevitt, Esquire, represented the Claimant, who was present. John Turnbull, 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 OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019); 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

Clmt. Ex. 1 – Contract documents
- a. Scope of Work, dated September 29, 2016 (signed October 13, 2016)
- b. Welcome letter from the Respondent to the Claimant, undated
- c. 3D drawing, dated September 29, 2016

Clmt. Ex. 2 – Invoices, dated October 13, 2016, January 26, 2017, and April 3, 2017

Clmt. Ex. 3 – Communications
- a. Email from the Claimant to the Respondent, dated May 1, 2017

[2] Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.
[3] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

b. Emails between the Claimant and the Respondent, dated May 2 – 12, 2017
c. Email from the Claimant to the Respondent, dated June 1, 2017
d. Email from the Claimant to the Respondent, dated June 8, 2017
e. Email from the Claimant to the Respondent, dated June 16, 2017
f. Email from the Claimant to the Respondent, dated June 19, 2017
g. Email from the Claimant to the Respondent, dated June 21, 2017
h. Emails between the Claimant and the Respondent, dated June 16 – 28, 2017
i. Emails between the Claimant and the Respondent, dated July 6 – 10, 2017
j. Emails between the Claimant and the Respondent, dated July 6 – 21, 2017
k. Emails between the Claimant and the Respondent, dated July 24, 2017

Clmt. Ex. 4 – MHIC Complaint Form, received on November 3, 2017

Clmt. Ex. 5 – Letter from Ardent Home Improvement in response to MHIC Complaint No. 581-2018, dated December 1, 2017

Clmt. Ex. 6 – Email from Dennis Orr to the Claimant, dated July 6, 2017

Clmt. Ex. 7 – Brothers Services Company proposal, dated September 19, 2017

Clmt. Ex. 8 – Brothers Services Company proposal modification, dated December 6, 2017

Clmt. Ex. 9 – Brothers Services Company statement, dated April 24, 2018; cancelled check #8970 (in the amount of $10,425.00); cancelled check #1030 (in the amount of $2,342.00; cancelled check #1033 (in the amount of $3,495.00

Clmt. Ex. 10 – Able Electrical Services Invoice #19011, dated March 16, 2018; Able Electrical Services Invoice #18335, dated August 24, 2017

The Respondent offered no documents to be admitted into evidence.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 – Hearing Order, dated July 19, 2019

Fund Ex. 2 – Notice of Hearing, dated November 13, 2019

Fund Ex. 3 – Home Improvement Claim Form, received on May 21, 2018

Fund Ex. 4 – Licensing history, printed on November 19, 2019

Fund Ex. 5 – Letter from John D. Hart, Assistant Attorney General, Counsel to the MHIC, to Stephen Kleeman, Esquire, dated May 15, 2019

Testimony

Both the Claimant and Respondent testified. Neither party nor the Fund presented any additional 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 93550.

2. The Respondent served in the capacity as a salesperson and he prepared the drawings for home improvement projects, but subcontractors performed all the work.

3. On October 13, 2016, the Claimant and the Respondent entered into a contract for a master bathroom renovation project to include demolition, framing, electrical, plumbing, drywall, tile, cabinets, hardware, countertops, granite shelves, glasswork, trim work, painting, and clean-up (Contract).

4. The Contract did not contain a begin or end date for the project.

5. The Contract constituted the entire understanding between the parties; there were no subsequent change orders or modifications mutually agreed to by the parties.

6. The original agreed-upon Contract price was $43,480.00, based a payment schedule, as follows:

A deposit of $14,493.00 is required for scheduling (maximum 33 1/3%).

A payment of $12,319.50 is due upon demolition.

A payment of $12,319.50 is due upon cabinet delivery.

Balance of $ 4,348.00 is due upon completion of above work.

Clmt. Ex. 1a.

7. On October 13, 2016, the Claimant paid the Respondent the initial deposit of $14,493.00.

8. On January 10, 2017, the Respondent filed for Chapter 11 bankruptcy for his business entity.[4]

9. The Respondent did not tell the Claimant that he filed for bankruptcy prior to beginning work on January 25, 2017 or before accepting a second payment from the Claimant in the amount of $12,319.50 on January 26, 2017.

10. From January 2017 to April 2017, work progressed on the project but there were frequent periods when the work stopped and started back up again.

11. When the cabinetry arrived on April 3, 2017, the Claimant paid the Respondent a third installment payment in the amount of $12,319.50.

12. In the month of April, the Claimant complained to the Respondent that the shower pan was installed improperly due to it being not level. The Respondent disagreed that the installation was improper. However, after the Claimant presented photographs depicting the improper installation, the Respondent corrected the issue.

13. By May 1, 2017, the Claimant began questioning the Respondent about the anticipated completion date. The Claimant told the Respondent that he wanted the project done by Memorial Day (May 29, 2017), because his oldest child was graduating the first week of June 2017 and family would be visiting.

14. On May 2, 2017, the Respondent emailed the Claimant to inform him that the tile had arrived, and his crew would begin installing the tile and granite. He also informed the Claimant that the glasswork could be measured for installation. In the same email, the

[4] The U.S. Bankruptcy Court converted the case to a Chapter 7 on October 2, 2017.

Respondent told the Claimant that the anticipated completion date would be two weeks from May 2, 2017, or approximately May 16, 2017.

15. The Respondent did not complete the project by the anticipated due date and no appreciable work had been performed between May 2, 2017 and May 16, 2017.

16. On June 1, 2017, the Claimant sent the Respondent an email asking for a definitive timeline he can expect to see the completion of the project.

17. On June 16, 2017, the Claimant sent the Respondent an email detailing what he believed to be the outstanding items to be installed or resolved to complete the project, including but not limited to:

- Shower (door, sealing of the tiles, and installation of fixtures);
- Installation of the tub, sink fixtures, cabinet trim, toilet, exhaust fans, lighting (tub light), controls for the heated floor, towel fixtures, and door hardware; and
- Paint and trim.

18. By June 16, 2017, the Respondent's work crew had stopped all work.

19. When the Respondent failed to respond to the Claimant's June 16, 2017 email, the Claimant sent another email on June 21, 2017 requesting a detailed list of all outstanding materials to be installed, a delivery schedule for the materials, and a timeline for finishing the project.

20. On June 21, 2017, the Respondent sent the Claimant an email[5] informing him that he had filed for bankruptcy. He told the Claimant to expect "more delays" in the completion of the project because he only had "a bare minimal crew." The Respondent told the Claimant that his company did not have the funds to purchase the remaining materials due to the "expensive" nature of those items. The Respondent estimated the "remaining material costs" at "roughly

[5] I will refer to the Respondent's June 21, 2017 proposal as the Plan.

$8,900.00." The Respondent asked the Claimant to pay the remaining balance of $4,348.00 to purchase most of the remaining fixtures, with the Respondent paying out of pocket for the rest. The Respondent also indicated that without the $4,348.00 payment, "the job will sit until I try and pull the money together from other job sources which will take some time unfortunately." Clmt. Ex. 3h.

21. On July 6, 2017, Dennis Orr with Kingsley Enterprises, LLC, a Maryland-licensed contractor, reviewed the project and determined that the following work remained outstanding with an estimated cost of $29,950.00:

Shower	
• Complete the grouting	$ 500.00
• Fill and check the drain	$ 200.00
• Remove improper tile from niche edges, install bullnose	$1,500.00
• Polish edging	$ 500.00
• Size and install frameless glass and door	$5,000.00
• Install valves, shower heads, two body spray nozzles, diverter and trim	$2,000.00
• Complete light installation	$ 700.00
Electrical	
• Install new exhaust fan	$ 500.00
• Test resistance and install thermostat for heated floor	$ 400.00
• Complete installing lights in ceiling	$1,000.00
• Install lights over vanities	$1,000.00
• Install outlets in mirrors	$ 300.00
• Install fan light combo in water closet	$ 500.00
• Install missing switches, boxes, and cover plates	$1,000.00
Toilet	
• Install toilet	$ 600.00
• Install fan/light	$ 500.00
Tub	
• Set and install tub, mount faucet/rinse hose, trim, as required	$2,000.00
Walls/Trim	
• Install trim around window	$ 500.00
• Paint/touch up, as needed, throughout	$1,000.00
• Repair drywall, as required	$1,000.00
	$1,000.00

[illegible]

• Patch and repair areas around vanities	$ 600.00
• Install thresholds at both doors	$ 400.00
• Install hardware on closet door	-
Vanities	
• Furnish and install mirrors and trim	$2,500.00
• Install drawer and cabinet pulls	$1,000.00
• Mount and install faucets and drains	$2,000.00
• Complete piping of sinks	$1,000.00
• Install laundry chute	$ 750.00

Clmt. Ex. 6.

22. Having lost confidence in the Respondent, in two separate emails dated July 6 and July 7, 2017, the Claimant rejected the Respondent's Plan and instead asked that the Respondent meet certain conditions, including a signed modification or change order to the Contract, before agreeing to pay the final payment.[6]

23. In an email dated July 7, 2017, the Respondent responded by calling the Claimant's "requests and claims at this point [to be] absolutely ridiculous." Clmt. Ex. 3i.

24. On September 19, 2017, the Claimant entered into a contract with Brothers Services Company (Brothers), a Maryland-licensed contractor, to complete or remedy the work performed by the Respondent. The scope of work was like that of Kingsley Enterprises and the proposal price was $34,750.00.

25. When Brothers began work at the Claimant's home it discovered that the Respondent failed to obtain the requisite permits for the electrical and plumbing work prior to doing the rough-in (drywall and paint), and that the shower body sprays/joints had not been

[6] Summarizing those conditions, the Claimant asked for the delivery of all materials purchased up to date but not installed; a detailed accounting of costs associated with the project; a detailed timeline for completion of the project; and a written addendum to the contract. Alternatively, he requested a full refund of all funds not expended per the Contract. Clmt. Ex. 3i.

glued or plumbed correctly. This resulted in a change order in the amount of $1,492.00, for a total cost of $36,242.00 to complete or remedy the work performed by the Respondent.

26. The Claimant paid $36,242.00 to Brothers as well as $1,845.00 to Able Electrical Services (Able) to evaluate the master bathroom wiring and perform the final testing for inspection.[7]

27. On page 7, paragraph 12 of the Contract, the parties agreed to submit any dispute "relating to ... the quality of work performed or any other matter" to arbitration. Clmt. Ex. 1a.

28. The Contract did not contain the following information as required by the MHIC:

a. whether an arbitrator's findings are binding;
b. whether there are any mandatory fees for arbitration;
c. whether a claim against the Fund would be stayed until completion of any mandatory arbitration proceeding;
d. that formal mediation of disputes between homeowners and contractors is available through the MHIC;
e. that the MHIC administers a Fund, which may compensate homeowners for certain actual losses caused by acts or omissions of licensed contractors; and
f. that a homeowner may request that a contractor purchase a performance bond for additional protection against losses not covered by the Fund.

29. The parties also did not affix their initials and date immediately adjacent to the mandatory arbitration clause, as required by the MHIC.

30. On May 15, 2019, the MHIC sent a letter to the Respondent's attorney at the time, Stephen J. Kleeman, Esquire, with copy to the Respondent at his business address on record, and asked that he submit documentation setting forth how the arbitration clause could be relied on despite the bankruptcy of the business entity.

[7] The Claimant did not include monies paid to Able or the Brothers for the change order as a part of his Claim before the Fund.

31. When neither Mr. Kleeman nor the Respondent responded to the MHIC's letter, the MHIC determined that the arbitration clause was void.

32. The Claimant sustained an actual monetary loss in the amount of $30,402.00.

DISCUSSION

LEGAL FRAMEWORK

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); *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.

Statutory Eligibility

Certain claimants, however, are excluded from recovering from the Fund altogether. In this regard, a claimant must prove that: (a) the claimant resides in the home as to which the claim is made, or owns no more than three dwelling places; (b) the claimant is not an employee, officer or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the claimant did not unreasonably reject the contractor's good faith effort to resolve the claim; (e) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (f) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (g) the claimant filed the claim with the MHIC within three years of the date the claimant

knew, or with reasonable diligence should have known, of the loss or damage. Bus. Reg. §§ 8-101(g)(3)(i); 8-405(c), (d), (f), and (g); 8-408(b)(1) (2015 & Supp. 2019).

In this case, the Respondent claims that the Claimant is barred from recovering any monies under the Fund because the Claimant disregarded all good faith efforts to resolve the claim and thereafter filed a claim with the MHIC without first pursing arbitration. Pursuant to COMAR 28.02.01.21K(1), (2)(b), the party asserting "[a]n affirmative defense bears the burden of proof regarding the defense" by a preponderance of the evidence. Based on the record presented, I find that the Respondent failed to present credible evidence that the Claimant is barred from any recovery under the Fund.

With respect to whether the Claimant unreasonably rejected the Respondent's good faith efforts to resolve the claim, in a letter dated December 1, 2017, the Respondent told the MHIC that he "tried many times to offer solutions and ways of getting the project completed. No matter what I proposed [the Claimant] insisted that I refund ALL of his money so that he could have the work completed by another contractor." Clmt. Ex. 5. In addition, the Respondent expressed being "deeply apologetic" for the "very unfortunate situation" he was in and he wanted the MHIC to know that he is "a good contractor who ran into financial hardship due to some bad business decisions." *Id.*

The Claimant, on the other hand, presented a significant number of emails between himself and the Respondent that painted an entirely different picture of the Respondent's sincerity and demeanor. *See* Clmt. Ex. 3. In one of those emails, the Respondent proposed a Plan where the Claimant would pay the last installment

> of $4,348.00 to order the remaining fixtures.... [and] I will provide the money for the other $4,552.00 in materials and the labor to finish the project up when the items arrive. With your contribution we are able to bring the project to a close

> relatively soon. Without it the job will sit until I try and pull the money together from other job sources which will take some time unfortunately.

Clmt. Ex. 3h. The Respondent neglected to communicate to the MHIC that this Plan was also included in the same email he sent to the Claimant stating that he had filed for bankruptcy months earlier. Moreover, the Respondent failed to list the Claimant as a creditor in his bankruptcy filing, so the Claimant was completely unaware of the Respondent's precarious financial situation until he learned of it in the June 21, 2017 email.

There is no dispute between the parties that the Claimant rejected the proposed Plan largely because he took umbrage to the Respondent's suggestion that he pay the last installment when "[t]he project [was] approximately 60% complete" and he had already paid "90% of the contract amount to date." Clmt. Ex. 3h. While it is true that the Claimant demanded a "refund of all funds not expended per the plans by 21 July" (Clmt. Ex. 3i), his counterproposals evolved from there. Here is one example:

> You may demonstrate your good faith desire to reenter into this contract, which we contend is now in breach due to your actions, by taking the following steps:
>
> 1. Provide and deliver all remaining materials as outlined in the contract in full and complete to our home for storage until such time as they can be properly installed
> 2. Provide a detailed accounting of costs associated with our project in order to validate remaining funds
> 3. Provide a detailed time bound plan for completion of the work
> a. Plan must include a dedicated crew, acceptable to owner, for completion
> 4. The above should be submitted as a written addendum to the contract, agreed and signed separately
>
> If it is your intent to reinstate this violated contract, these four items are paramount to restore our trust in your firm.

Id.; *see also* Findings of Fact No. 22. The Respondent, on the other hand, rejected all counter-proposals considering it "counterproductive to me and a complete waste of time and energy."

[illegible]

Clmt. Ex. 3k. Nevertheless, the parties went back and forth via their respective attorneys for approximately two months without agreeing to a workable resolution.

Given this backdrop, it is disingenuous for the Respondent to suggest that the Claimant disregarded all good faith efforts to resolve the claim. Good faith refers to "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage." *Black's Law Dictionary* 836 (11th ed. 2019). I am not persuaded by the Respondent's testimony, or his actions while engaging with the Claimant, that he was honest about the bankruptcy filing before taking the second installment payment or beginning work on the project. The Respondent deprived the Claimant an opportunity to cancel the Contract before the work began in order to hire another contractor. This amounted to an abject failure on the Respondent's part to honor his duty under the Contract to engage in fair dealing with the Claimant. By the time the work was approximately sixty percent complete, the Respondent had "been forced to reduce to a bare minimal crew" (Clmt. Ex. 3h), and he did "not have any materials for [the] project and [he did] not have the available capital to obtain them" (Clmt. Ex. 3i). In other words, the Respondent lacked the funds and manpower to finish the project. While the Respondent is quick to state that he never defrauded the Claimant and that he was making a sincere effort to fulfill his obligation under the Contract, I found his credibility lacking.

The Respondent exuded disdain in his emails when the Claimant sought reassurances from him as to when the project would be completed. The Respondent also made statements during his testimony that projected a false narrative that he was the victim of the Claimant's lack of understanding and compassion for his situation; for instance, he testified how he had to tear

out an improperly installed shower pain "at my own expense regardless of the tight funds." More importantly, the Respondent acknowledged on cross-examination that he attempted to "change the terms of the Contract" via his Plan, yet he refused to modify the Contract because "the Plan to complete was post-contract." The Respondent also testified on cross-examination that he did not have enough money in his bank account to reach a point to finish the project. Therefore, the Respondent's demand that the Claimant pay the last installment payment when he was not obligated to do so was not a good faith effort to resolve the dispute between the parties.

With reference to the contractual arbitration clause, the Respondent indicated that the Contract specifically contained language requiring all disputes be submitted to arbitration and that did not occur here. The Claimant did not deny this, but he was quick to state that the Respondent was in breach of the Contract when he abandoned the job due to his financial instability that led to the bankruptcy. In addition, as described above, the Claimant offered into evidence several emails between himself and the Respondent showing that he attempted to resolve the matter with the Respondent before filing a claim with the Fund.

The Fund also weighed into this discussion by indicating that the arbitration clause contained in the Contract failed to contain certain mandatory information as required by COMAR 09.08.01.25, which provides:

> **.25 Arbitration Clause.**
> A. A mandatory arbitration clause in a home improvement contract shall include the following information:
> (1) The name of the person or organization that will conduct the arbitration;
> (2) Whether any mandatory fees will be charged to the parties for participation in the arbitration and include the fee schedule;
> (3) Whether the arbitrator's findings are binding; and
> (4) A disclosure that, under Business Regulation Article, §8-405(c), Annotated Code of Maryland, a claim against the Home Improvement Guaranty Fund by an owner shall be stayed until completion of any mandatory arbitration proceeding.

> B. The parties shall affix their initials and date immediately adjacent to any mandatory arbitration clause in a home improvement contract, at the time of execution of the contract.

Since the Contract lacked the requisite language, the Fund took the position that the arbitration clause cannot serve as a shield against a claim before the Fund. Moreover, and more importantly, the Fund took the position that the Claimant was "prevented from arbitrating his dispute because the company [was] in bankruptcy." Fund Ex. 5. On May 15, 2019, the MHIC sent a letter to the Respondent and his attorney asking that the Respondent submit documentation to the Commission setting forth how arbitration can be accomplished despite the bankruptcy. *Id.* When neither the Respondent nor his attorney responded to the letter, the MHIC determined that the arbitration clause had been waived and it allowed the claim to be sent to the OAH for adjudication.

The Respondent challenged the position taken by the Fund arguing that only the Claimant may trigger the binding arbitration clause per COMAR 09.08.03.02E(2) and that the Fund may not step into the shoes of the Claimant to ascertain that information. Specifically, that regulation provides:

> E. Compulsory Binding Arbitration. When a contract between a claimant and a contractor requires that all contract disputes be submitted to binding arbitration, **the claimant shall either**:
>
> (1) Submit their dispute to binding arbitration as required by the contract; or
>
> (2) Provide evidence to the Commission that the claimant has made good faith efforts to bring the dispute to binding arbitration which the contractor has either rejected or not responded to. The Commission shall then give the contractor written notice that, if the contractor does not agree to binding arbitration, the Commission will consider the compulsory arbitration clause to be void and process the claimant's claim pursuant to this chapter.

COMAR 09.08.03.02E (emphasis added).

I found the Respondent's argument to be inapposite because it sidestepped the crux of the issue. There is no dispute that the Respondent filed for bankruptcy in January 2017 and, by May

15, 2019, the bankruptcy had already been converted from a Chapter 11 to a Chapter 7 and all debts had been discharged. Under Chapter 11, oftentimes referred to as a reorganization, the debtor may seek an adjustment of debts, either by reducing the debt, extending the time for repayment, or seeking a more comprehensive reorganization. *See generally* 11 United States Code Annotated (U.S.C.A.) §§ 1101 – 1195 (2015). Filing a petition under Chapter 7, on the other hand, automatically stays or stops most collection actions against the debtor or the debtor's property.[8] 11 U.S.C.A. § 362(a)(1) (2015). "As long as the stay is in effect creditors generally may not initiate or continue lawsuits, wage garnishments, or even telephone calls demanding payments." (https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics) (last viewed on March 3, 2020). While the Respondent may voluntarily negotiate any discharged debt, the debt is nevertheless no longer legally enforceable. (https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics) (last viewed on March 3, 2020). When the Respondent failed to respond to the MHIC's demand for documentation "setting forth how the arbitration in the contract can still be accomplished despite the bankruptcy" (Fund Ex. 5), the Respondent effectively waived his right to demand binding arbitration. And the MHIC's determination that the arbitration clause was void was proper. COMAR 09.08.03.02E(2). Furthermore, it should be noted that there are no provisions in the statute or the regulations that bars the Fund from inquiring about an arbitration clause in a contract when a Claimant files for an award and the Fund seeks to determine if the claim is allowable.

[8] None of the exceptions apply here. *See* 11 U.S.C.A. § 362(b)(2).

Accordingly, the credible evidence establishes there are no *prima facie* impediments barring the Claimant from recovering from the Fund. Bus. Reg. §§ 8-101(g)(3)(i); 8-405(c), (d), (f), and (g); 8-408(b)(1) (2015 & Supp. 2019).

THE MERITS OF THIS CASE

Burden of Proof

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); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)). For the following reasons, I find that the Claimant has proven eligibility for compensation.

Was the Home Improvement Unworkmanlike, Inadequate or Incomplete?

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The scope of work to be performed under the Contract consisted of a major renovation of the master bathroom. And while the majority of the work performed was workmanlike, the root issue here is that the Respondent failed to finish the project and when another contractor stepped in to complete the original contract it was discovered that certain building permits had not been obtained prior to the rough-in.

There is no dispute between the parties that the Respondent failed to finish the project as prescribed by the Contract. One obvious contention between the parties, however, was the percentage of completion of the project when the Respondent or the subcontractors stopped

working. According to the Claimant, only sixty percent of the project had been completed when the Respondent abandoned the job. The Respondent, on the other hand, insists that more of the project had been completed and he wholeheartedly denied ever abandoning the job for the reasons previously described (*see* the discussion above regarding good faith).

Between the two witnesses, I found the Claimant's testimony far more credible. The Claimant's position never waived. He consistently told the Respondent in a variety of emails beginning in June 2017 that much of the work envisioned by the Contract remained outstanding. In fact, from a layman's perspective, the Claimant listed in emails to the Respondent, dated June 16, 2017 (Clmt Ex. 3e) and July 10, 2017 (Clmt Ex. 3h), what he believed to be the uncompleted items. The Claimant also obtained quotes from two separate Maryland-licensed contractors who estimated the cost to complete the project at $29,950.00 (Kingsley Enterprises) and $34,750.00 (Brothers). The Respondent, on the other hand, vacillated between whether the project was ninety percent complete (*see* email dated July 10, 2017, Clmt. Ex. 3i) to eighty percent complete (*see* Clmt. Ex. 5) to seventy or seventy-five complete (testimony). In other words, the Respondent had no idea of how far along the project was when the subcontractors stopped working because, as he admitted on cross-examination, he had only been to the home maybe five or six times during the course of six months (January to June of 2017). He also acknowledged on direct examination, "I cannot testify to everything" that was left to be completed. Whereas the original Contract price was $43,480.00 and the two quotes list the amount to complete the work to be about one-half that value, I am persuaded by the Claimant's testimony that the project was approximately sixty percent complete when the work stopped.

Not to belabor the point, but I also did not find the Respondent's commentary that he had not abandoned the project to be credible or consistent with the record before me. In a June 17,

2017 email the Respondent wrote "I'm sorry I couldn't completely fulfill our agreement according to the terms..." Clmt Ex. 3i. This statement occurred after numerous emails beginning in April 2017 from the Claimant requesting a status update on the progress of the work. The statement was also well past the point when the work began to wane in May 2017 and eventually stopped in June 2017. While the term abandonment in not defined in the Business Regulation or COMAR, it has a common meaning of "[t]o leave (someone), esp. when doing so amounts to an abdication of responsibility" (*Merriam-Webster's Collegiate Dictionary* 2 (11th ed. 2006) and a legal meaning of "to cease intending or attempting to perform" (*Black's Law Dictionary* 1 (11th ed. 2019)). While the Respondent is of the opinion that his Plan demonstrated his intention to perform under the Contract, he fails to see that the Plan failed to cure the abandonment that had already occurred when he could not completely fulfill his obligation under the Contract due to financial circumstances.

As for the work to be performed to complete the work envisioned under the Contract, I found the Claimant's testimony credible and supported by the record. He sought two quotes from two contractors and settled on Brothers to perform the work. It was through the course of completing the work, that Brothers discovered that permits had not been obtained prior to the rough-in. As mentioned above, the Respondent was not providing hands-on oversight of the project and relied solely on the subcontractors to do the work. Though the Respondent acknowledged on cross-examination that it was the responsibility of his company to obtain the permits,[9] he was at a loss for words when he learned that no permits had been pulled (he testified that it was "never brought to my attention").

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[9] *See* COMAR 09.08.01.08.

Even though no one from Brothers appeared at the hearing to provide firsthand knowledge of its involvement in bringing the project to fruition, I am persuaded by the documents in evidence that the work performed was necessary. Clmt. Ex. 7. The Respondent's jab at the Claimant in closing remarks decrying how "disturbing" it was for someone who "dots the i's and crosses the t's" to have failed to present a signed contract from Brothers or photographs of the project at the time the Respondent stopped work was "suspicious" and suggested he had more work "done in excess" of the original Contract. The Respondent also thought it "foolish" for the Claimant to have spent $36,242.00 to complete the work. These attacks at the Claimant's credibility was unnecessary and unpersuasive. As described in detail above, the Respondent left the project with having only completed sixty percent of the work. The Respondent also failed to account for the fact that his crew did not obtain permits and so certain work had to be redone. And based on the Claimant's testimony, which I found credible, the work was consistent with the Kingsley estimate, which was itemized by task and cost. Therefore, the scope of work from Brothers is entirely consistent with the facts presented in this case. Therefore, I am persuaded by a preponderance of the evidence that the Claimant is eligible for compensation from the Fund.

Amount of Actual Loss

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). The 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 approximately sixty percent of the work required per 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).

Based on this formula, the Claimant's actual loss is $30,402.00.

Amount paid under the Contract.....	$39,132.00
Plus amount paid to Brothers.....	$34,750.00[10]
Subtotal.....	$73,882.00
Minus original Contract price.....	$43,480.00
Total.....	$30,402.00

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 of $30,402.00 exceeds $20,000.00. Therefore, the Claimant's recovery is limited to $20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

[10] This figure does not include the Brothers' change order in the amount of $1,492.00 or the monies paid to Able in the amount of $1,845.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss $30,402.00 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)(c). I further conclude that the Claimant is entitled to recover $20,000.00 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $20,000.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;[11] and

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

March 11, 2020
Date Decision Issued

Kathleen A. Chapman
Administrative Law Judge

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

PROPOSED ORDER

WHEREFORE, this 22nd day of April, 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.

Joseph Tunney

Joseph Tunney
Chairman
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION