

IN THE MATTER OF THE CLAIM	* BEFORE WILLIAM SOMERVILLE,
OF PHILLIP FORTNER,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR ACTS OR OMISSIONS	*
ALLEGED AGAINST ELROY	*
JOHNSON, T/A BUILDING BLOCKS	*
DEVELOPMENT, LLC	* OAH No.: LABOR-HIC-02-24-15058
RESPONDENT	* MHIC No.: 23 (75) 1257

\* \* \* \* \*

### **PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSIONS OF LAW  
RECOMMENDED ORDER

### **STATEMENT OF THE CASE**

On February 28, 2024, Phillip Fortner (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)<sup>1</sup> Guaranty Fund (Fund) for reimbursement of \$10,000.00 for actual losses he alleged that he suffered as a result of a home improvement contract with Elroy A. Johnson (Respondent), trading as Building Blocks Development, LLC (Company). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).<sup>2</sup> On June 3,

<sup>1</sup> The MHIC is a division of the Department of Labor (Department).

<sup>2</sup> Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code. Later, in October 2024, a replacement volume was issued.

2024, the MHIC issued a Hearing Order on the Claim and referred the matter to the Office of Administrative Hearings (OAH) for a hearing.

On September 26, 2024, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Hope Sachs, Assistant Attorney General, represented the Fund. The Claimant was self-represented. The Respondent failed to appear.

After waiting at least fifteen minutes for the Respondent or the Respondent's representative to appear, I reviewed the case file, confirmed that notices were sent to the Respondent's correct address, ruled that the Respondent was properly notified, and proceeded in the Respondent's absence. 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. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2024); 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 offered by the Claimant:

- Clmt. Ex. 1 - Packet of three documents, various dates, reflecting wire payments from the Claimant to the Company
- Clmt. Ex. 2 - Packet of email messages showing incomplete message threads reflecting terms of a verbal agreement, various dates
- Clmt. Ex. 3 - Packet of email messages showing incomplete message threads reflecting the Claimant's requests for a refund, various dates

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Packet of notices, various dates

Fund Ex. 2 - Licensing history document

Fund Ex. 3 - Letter, dated 3/1/2024, with attachments

Testimony

The Claimant testified and did not present other witnesses. No other witness testified.

**PROPOSED FINDINGS OF FACT**

Having considered testimony, demeanor evidence, and other evidence, 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 licensed by the MHIC as a home improvement contractor. He was the licensed contractor for the Company.
2. On January 27, 2023, the Claimant and the Company entered into a verbal contract by which the Claimant would pay \$15,000.00 and the Company was to do some remodeling in the Claimant's residence. The Claimant was to pay one-third of the total as a down payment or deposit. Among other things, the Company was to extensively remodel the kitchen, refinish some stairs, replace some light fixtures, replace some flooring in three bathrooms, refinish existing wood floors, and frame, install drywall, and paint the basement. No start date had been stated or agreed upon.
3. On January 27, 2023, the Claimant wired to the Company a \$1,000.00 payment through the Zelle payment system, and he wired the Company \$4,000.00 through a more conventional bank wire transfer.
4. At some point between January 27, 2023, and February 10, 2023, the parties agreed that the project start date would be February 10, 2023.

5. On or about February 10, 2023, the Respondent asked the Claimant for another payment of \$5,000.00.

6. On February 10, 2023, the Claimant wired the Company the additional \$5,000.00. The Company had not yet started the project, and did not start on that day.

7. At some point thereafter, the Respondent told the Claimant that the Company would begin work on the basement and kitchen on Monday, February 20, 2023.

8. On February 20, 2023, which was Presidents' Day, the Company did not begin the project.

9. On or before February 22, 2023, the Claimant asked the Respondent for his money to be returned, and he gave the Respondent his checking account number and routing number.

10. On February 22, 2023, the Respondent told the Claimant that he would "be at the bank around 3:30" to execute the transfer of the refund money. (Clmt. Ex. 2.) No refund was sent that day.

11. On March 6, 2023, not having received a refund of the \$10,000.00, the Claimant threatened "to contact the Maryland Business Board." (Clmt. Ex. 2.)

12. At no time did the Company do any work on the project.

13. At no time did the Company return any money to the Claimant.

14. On February 24, 2024, the Claimant filed a claim against the Fund.

## **DISCUSSION**

### **Burdens**

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov't § 10-217 (2021); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so

than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

With regard to the burden of persuasion and the weight of evidence, a trier of fact can properly accept all, some, or none of the evidence offered. *See Sifrit v. State*, 383 Md. 116, 135 (2004); *Edsall v. Huffaker*, 159 Md. App. 337, 341 (2004). Demeanor evidence played an important role in this matter. *Bragunier Masonry Contractors, Inc. v. Maryland Comm’r of Labor and Indus.*, 111 Md. App. 698, 717, n.7 (1996); *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 487 (2d Cir. 1952).

### **Arguments of the Parties**

The Claimant argues that he entered into a verbal contract with the Company, and he paid the Company \$10,000.00, but that the Company did not begin the project. He would like the Fund to award him the amount of money that he paid to the Company.

The Fund argues that the Claimant paid \$10,000.00 to the Company and the Company failed to begin the work. It argues that the Company abandoned the job and absconded with the \$10,000.00.

### **Analysis**

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for 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.

By statute, certain claimants are excluded from recovering from the Fund and certain other factors disqualify recovery altogether. In this case, no party argues that such a

disqualification exists and there is no showing of such statutory impediments to the Claimant's recovery. *Id.* §§ 8-405; 8-408. In addition, there was no showing that the Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d).

In the instant case, the Respondent was the MHIC license holder for the Company; he was responsible for the Company's acts and omissions. *See* COMAR 09.08.01.04.

The Claimant has demonstrated that the Company violated a statutory-based industry standard when it took his money but did not perform. (Findings of Fact 3, 6, and 12.) Md. Code Ann., Bus. Reg. § 8-605 (abandonment or failure to perform without justification); COMAR 09.08.03.03B(3)(a) (agency regulations contemplate awards for abandonment.) There was no showing of justification. To the extent that work might have been started, the resulting product was also inadequate and incomplete. Md. Code Ann., Bus. Reg. § 8-401.

Having concluded that the Claimant has shown that an actual loss occurred, I will apply the appropriate regulatory formula to determine the compensable amount of actual loss. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. *Id.* § 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 the instant case, the Company abandoned the project without doing any work. Accordingly, the following formula appropriately measures the Claimant's actual loss: "If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract." COMAR

09.08.03.03B(3)(a). In this case, the Company abandoned the project after the Claimant had already paid \$10,000.00. That amount is the amount of actual loss in this particular case.<sup>3</sup>

### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has demonstrated that he sustained an actual and compensable loss of \$10,000.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2024); COMAR 09.08.03.03B(3)(a). I further conclude that the Claimant has shown that he is entitled to recover that amount from the Fund.

### **RECOMMENDED ORDER**


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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$10,000.00; 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;<sup>4</sup> and

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

December 18, 2024  
Date Order Issued

  
\_\_\_\_\_  
William J.D. Somerville III  
Administrative Law Judge

WS/emh  
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<sup>3</sup> In this case, that amount is not more than the statutory cap and is not more than the amount the Claimant paid. Bus. Reg. § 8-405(e)(1), (5) (2024); COMAR 09.08.03.03B(4).

<sup>4</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2024); COMAR 09.08.01.20.

PROPOSED ORDER

*WHEREFORE, this 8<sup>th</sup> day of May, 2025, 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*

*Chairman*

*Panel B*

*MARYLAND HOME IMPROVEMENT  
COMMISSION*