IN THE MATTER OF THE CLAIM OF	*	**BEFORE MARY PEZZULLA,**
CLIFTON AND SANDRA TRENT,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANTS	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF JAN MINDESS,	*	
T/A GENCO CONSTRUCTION, INC.,	*	**OAH No.: LABOR-HIC-02-19-40347**
RESPONDENT	*	**MHIC No.: 20 (90) 6**

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PROPOSED DECISION

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STATEMENT OF THE CASE

On September 6, 2019, Clifton and Sandra Trent (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),[1] for reimbursement of $66,500.00 in actual losses allegedly suffered as a result of a home improvement contract with Jan Mindess, trading as Genco Construction, Inc. (Respondent).

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

Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).[2] On December 9, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on October 7, 2020,[3] at the OAH in Hunt Valley, Maryland.

Bus. Reg. § 8-407(e). Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. Sandra Trent represented the Claimants. The Respondent failed to appear and did not participate in the proceeding.

Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Code of Maryland Regulations (COMAR) 28.02.01.23A. On September 4, 2020, notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail. COMAR 09.08.03.03A(2). Both were returned as undeliverable on September 28, 2020. The Respondent did not notify the OAH of any change of address. COMAR 28.02.01.03E. The statutory provisions governing disciplinary proceedings against MHIC licensees state that notice of the proceeding shall be sent by certified mail to "the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d). These same notice procedures apply to proceedings involving claims against the Fund. Md. Code Ann., Bus. Reg. § 8-407(a). The Respondent is obligated to keep the MHIC apprised of his current address. *See* Md. Code Ann., Bus. Reg. § 8-309 (requiring a licensee to notify the MHIC of a change of address within ten days). Notice of the hearing was sent to the Respondent by first-class and certified mailing using the MHIC's last known business addresses for the Respondent. The method of notice to the Respondent was reasonably calculated to provide him with notice of the hearing and I concluded that the Respondent received proper

[2] Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.
[3] The hearing was originally scheduled for June 3, 2020 at the Tawes State Office Building in Annapolis, Maryland, but was postponed due to the COVID-19 pandemic.

notice of the hearing. Md. Code Ann., Bus. Reg. §§ 8-312(d), 8-407(a); Md. Code Ann., State Gov't § 10-209 (2014); *Board of Nursing v. Sesay*, 224 Md. App. 432 (2015).

After waiting approximately twenty minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing.

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. 2020); COMAR 09.01.03; and COMAR 28.02.01.

ISSUES

1. Did the Claimants 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 Claimants' behalf:

Clmt. Ex. 1 - Summary of case prepared by the Claimants, undated

Clmt. Ex. 2 - Contract between the Claimants and the Respondent, January 15, 2018

Clmt. Ex. 3 - Check number 101 from the Claimants to the Respondent in the amount of $10,000.00, January 15, 2018; Check number 102 from the Claimants to the Respondent in the amount of $10,000.00, January 19, 2018; Check number 103 from the Claimants to the Respondent in the amount of $11,500.00, January 22, 2018; Check number 105 from the Claimants to the Respondent in the amount of $20,000.00, February 13, 2018; Check number 106 from the Claimants to the Respondent in the amount of $10,000.00, February 23, 2018; and Check number 109 from the Claimants to the Respondent in the amount of $5,000.00, November 16, 2018

Clmt. Ex. 4 - Estimate from Bromin Construction, July 1, 2019

Clmt. Ex. 5 - List of work paid for in contract but not delivered/completed, prepared by the Claimants, undated

Clmt. Ex. 6 - Invoice Summary for work not completed, prepared by the Claimants, undated, with the following attachments:

- Gutter Helmet Contract, signed by Sandra Trent, January 24, 2020
- Gutter Helmet Invoice, March 18, 2020
- Wood Floors Plus, Inc. Sales Receipt, January 27, 2020
- All In Electric, Inc. Invoice, September 6, 2019
- All In Electric, Inc. Invoice, November 25, 2019
- All In Electric, Inc. Estimate, August 28, 2019
- Lowe's Home Improvement (Lowe's) Receipt, September 7, 2019
- Lowe's Receipt, July 20, 2019
- Wayfair Receipt, January 25, 2020
- Letter to the Claimants from M & T Bank regarding December 5, 2019 Wayfair transaction, February 26, 2020
- Coupons for payments of Lowe's Credit Card, various dates
- Lowe's quote, July 20, 2019
- Lowe's receipts, November 22, 2019, November 23, 2019, and July 23, 2019
- Bray and Scarff Invoice, August 31, 2019 with acknowledgement, August 31, 2019
- Bray and Scarff Invoice, November 6, 2019 with acknowledgement, November 8, 2019
- Atlas Stone Fabricators, Inc. (Atlas) Estimate/Proposal, March 15, 2019
- Capital-One Statement, April 10, 2019 – May 9, 2019
- Capital-One Statement, October 10, 2019 – November 9, 2019
- The Home Depot Invoice, June 14, 2019

Clmt. Ex. 7 - Timeline prepared by the Claimants, undated with 17 photographs attached

Clmt. Ex. 8 - Photograph taken by the Claimants, March 2019

Clmt. Ex. 9 - MHIC Complaint Form with attached continuation, June 30, 2019

Clmt. Ex. 10 - Expense report prepared by Larry Mindel for the Claimants, various dates

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

Fund Ex. 1 - MHIC Hearing Order, December 2, 2019

Fund Ex. 2 - Notice of Hearing, Corrected Copy, September 4, 2020

Fund Ex. 3 - Notice of Remote Hearing, Rescheduled, August 28, 2020

Fund Ex. 4 - Notice of Hearing, February 25, 2020

Fund Ex. 5 - Letter to the Respondent from Joseph Tunney, MHIC, September 17, 2019 with attached MHIC Complaint Form, September 6, 2019

Fund Ex. 6 - Respondent's Licensing Records, September 10, 2020

Testimony

Sandra Trent testified on behalf of the Claimants and did not present other witnesses.

The Fund did not present any testimony.

The Respondent did not participate in the proceeding.

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 5411353.

2. On January 15, 2018, the Claimants and the Respondent entered into a contract to add an addition on the Claimants' house that would connect with the kitchen and living room and to remodel the kitchen (Contract). The Contract included removing a tree and stump from the yard; building the addition with a vaulted ceiling, including windows and a door; matching the siding to the existing siding on the house and trim; installing gutters with helmets; insulating the addition; installing hardwood floors in the dining room, kitchen, living room, and steps; purchasing and installing a wall-mounted fireplace; purchasing and installing custom cabinets and an island in the kitchen; purchasing and installing a cooktop with vent, two ovens, and a microwave; performing plumbing work as needed; installing recess lighting, two fans, switches, outlets, phone and cable wiring; purchasing and installing granite countertops and backsplash, as well as a new sink; and tying in new ductwork to the existing furnace. The Contract stated that the Respondent would obtain all permits and the work would be completed in a maximum of 120 days.

3. The original agreed-upon Contract price was $60,000.00.

4. At dates unclear in the record, the parties made amendments to the contract. The first amendment added $1,500.00 to purchase and install a Mitsubishi heater in the addition. The second amendment added $5,000.00 for the installation of a load bearing beam. The third amendment was that the Respondent would return $8,000.00 to the Claimants and the Claimants would be responsible for purchasing the granite of their choosing. The Respondent never refunded the Claimants the $8,000.00.

5. The Claimants paid the Respondent a total of $66,500.00.

6. The work proceeded at an incredibly slow pace. By May 2018, the Respondent had constructed the shell for the addition. By July 2018, the addition still had no roof, which caused flooding in the house. By December 2018, the Respondent had completed the roof of the addition, as well as the siding and windows. Black plastic sheeting separated the addition from the kitchen. In February 2019, the Respondent installed drywall and flooring in the addition. In March 2019, the Respondent removed the existing wall between the kitchen and the living room.

7. The Respondent did not complete the required electrical work in the kitchen.

8. The Respondent did not purchase the light fixtures or fans.

9. The Respondent did not purchase any of the appliances.

10. The Respondent did not purchase the wall-mounted fireplace.

11. The Respondent did not install covered gutters on the addition.

12. The flooring installed by the Respondent connecting the addition to the kitchen is sloped and uneven.

13. The cabinets the Respondent purchased were not the agreed upon cabinets. They were not the right dimensions and could not accommodate the cooktop.

14. In June 2019, the Claimants had a conversation with an employee of the Respondent, Dave, who said that he would be sending contractors to move the project along, after the Claimants complained that the project was not yet completed, although fully paid for.

15. Neither the Respondent, nor anyone employed by the Respondent, returned to the property after June 2019.

16. The Respondent did not return to retrieve the incorrect cabinets that had been delivered to the Claimants. The Claimants were eventually able to sell the cabinets for $1,000.00.

17. The Claimants paid a total of $34,889.68 to date to correct and complete the work began and then abandoned by the Respondent. This amount does not include $17,415.00 that the Claimants paid to purchase the granite of their choosing from Atlas.

18. The Claimants have not filed any legal proceedings against the Respondent arising from the Contract and have not filed any insurance claim related to the Respondent's work.

19. The Claimants are not related to the Respondent, are not employees or business associates of the Respondent, and are not related to an employee or business associate of the Respondent.

DISCUSSION

In this case, the Claimants have the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); 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 Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). 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. For the following reasons, I find that the Claimants have proven eligibility for compensation.

The Respondent was a licensed home improvement contractor under MHIC license number 5411353 at the time he entered into the Contract with the Claimants. The Respondent performed unworkmanlike, inadequate, or incomplete home improvements. Ms. Trent testified that she and her husband have been on a two-and-a-half-year rollercoaster in dealing with the Respondent and attempting to correct and complete the work that the Respondent began, but did not finish. She testified that she signed what she believed to be a very thorough contract with the Respondent on January 15, 2018. The scope of the work in the Contract was to add an addition on the Claimants' house that would connect with the kitchen and living room and to remodel the kitchen. The initial agreed upon Contract price was $60,000.00.

The Contract called for payments to be made as follows: $10,000.00 at signing; $10,000.00 "after decision sign off"; $10,000.00 "on start"; $10,000.00 "when under roof"; $10,000.00 upon 50% completion; and $10,000.00 on completion. (Clmt. Ex. 2). Despite the schedule of payments, the Claimants made the following payments to the Respondent: $10,000.00 on January 15, 2018; $10,000.00 on January 19, 2018; $11,500.00 on January 22, 2018; $20,000.00 on February 13, 2018; $10,000.00 on February 23, 2018; and $5,000.00 on November 16, 2018. The payments made to the Respondent totaled $66,500.00. Ms. Trent explained that the Respondent told her that it would be best to install a Mitsubishi heater in the addition, which would cost an additional $1,500.00. The Respondent also informed

her that he required an additional $5,000.00 to install a load bearing beam to stabilize the ceiling. The Claimants agreed to both of these modifications to the Contract.

Ms. Trent explained that anytime the Respondent asked for a payment, she made it because she did not want his workers to stop coming. She stated that the work progressed slowly, and she felt like she was always begging the Respondent to work on the project. She also testified that the Respondent told her that he was using the payments to buy materials needed for the project, including buying all the appliances, which were to be stored in a warehouse until their installation.

Regarding the work that was completed, Ms. Trent testified that even though the whole project was supposed to be completed in 120 days, by May 2018, only the shell of the addition had been completed and by July 2018, the addition still did not have a roof and the windows and siding had not be completed. By December 2018, the addition had a roof, insulation, siding, and windows, but did not have any heat and black plastic sheeting separated the addition from the kitchen. Gutters still had not been installed and the electrical work was not complete. Flooring was installed in the addition, but the flooring from the addition to the kitchen was uneven and sloped. Work did not even begin on the kitchen until March 2019.

Once work began on the kitchen remodel portion of the project, the Claimants learned that the vendor that the Respondent used for granite did not have the granite they wanted. The price of the granite was included in the Contract price. The Respondent agreed to refund the Claimants $8,000.00 and the Claimants would be responsible for purchasing the granite. The Claimants agreed to this modification. Ms. Trent testified that the Respondent provided an initial refund check for $4,000.00, but when she tried to deposit the check, it was returned for insufficient funds. The Respondent never refunded the $8,000.00 to the Claimants. The Claimants purchased granite for the kitchen in the amount of $17,415.00.

In April 2019, the Respondent removed the existing kitchen cabinets and in May 2019 the Respondent installed new flooring in the kitchen. Also during this time, the Respondent had cabinets delivered to the Claimant's home. Ms. Trent described the cabinets as "not to specifications" and explained that they were not the right sizes and did not provide room for the cooktop or trash can. She also described them as not being sturdy and that they did not seem like they would support granite countertops. When she pointed this out to the Respondent, she was told that he would "work it out."

The Respondent began electrical work in the kitchen in June 2019, but then the Respondent stopped coming to the house. On June 19, 2019, Ms. Trent emailed Dave, an employee of the Respondent, to find out when workers would be returning to complete the project. (Clmt. Ex. 9). Ms. Trent spoke to Dave on June 27, 2019 and he informed her that he would send people the following week. Neither the Respondent, nor anyone who worked for the Respondent returned to the project. The Respondent never returned to retrieve the cabinets that he left behind. Eventually, the Claimants were able to sell the unwanted cabinets for $1,000.00.

Ms. Trent testified that once it became clear that the Respondent was not going to complete the work, she and her husband had to figure out what to do next in order to get their home back in working order. In July 2019, she obtained an estimate from Bromin Construction to complete the home addition and kitchen renovation. This estimate was for $52,000.00. (Clmt. Ex. 4). Instead of using Bromin Construction, the Claimant's son-in-law, Larry Mindel, agreed to help them with the some of the kitchen repairs and remodeling. Mr. Mindel did not charge for his services and the Claimants paid for all of the necessary materials. The Claimants also used Gutter Helmet and All In Electric to complete the gutter and electrical work. Ms. Trent testified and presented invoices and receipts (Clmt. Ex. 6) for the following items that were left incomplete by the Respondent: Gutter Helmet gutters—$1,735.00; wood flooring for transition

area from addition to kitchen—$48.50; electrical work for kitchen and addition from All In Electric—$7,329.00; ceiling fan, outdoor lights, drawer pulls, draw inserts, sink connection, and microwave from Lowes—$838.18; cabinets from Lowes—$17,436.62;[4] light fixture and fireplace from Wayfair—$1,038.78; double oven and cooktop from Bray & Scarff—$6,268.57; faucet from The Home Depot—$195.04.[5] Additionally, the Claimants purchased granite for the countertops and island from Atlas for $17,415.00.

There is no question that the home improvements in this matter were incomplete. Additionally, the installation of the flooring from the addition to the kitchen, was unworkmanlike. Ms. Trent testified credibly that the flooring between the addition and kitchen was uneven and sloped. She even described being able to set a pencil on the floor and the pencil would start rolling on its own due to the slope. Despite the Contract providing that the work would be completed in 120 days, by June 2019, it was nowhere near completed. Ms. Trent testified with great detail and provided documentation of the many elements of the Contract that were not completed. (*See* Clmt. Ex. 6). I thus find that the Claimants are eligible for compensation from the Fund.

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

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[4] The Invoice Summary for Work Not Completed, prepared by the Claimants in Claimant Exhibit 6 lists the price of the cabinets as $17,631.97; however, Ms. Trent's testimony, the attached Lowe's receipts and coupons for Payments of Lowe's credit card, and the Expense Report (Clmt. Ex. 10) show the cost of the cabinets to be $17,436.62.
[5] These amounts total $34,889.69.

However, none of the following three regulatory formulas is exactly on point and appropriate in this case:

> (a) 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.
>
> (b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.
>
> (c) 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)(a)-(c). Accordingly, I shall apply a unique formula to measure the Claimants' actual loss. In this case, the Claimants have paid significant moneys to purchase items that should have been purchased and installed by the Respondent under the Contract and which their son-in-law has installed for them. Additionally, the Claimants hired subsequent contractors, Gutter Helmet and All In Electric, to complete work under the Contract. All of the items that the Claimants purchased and had installed by Mr. Mindel, as well as the work performed by Gutter Helmet and All In Electric were within the scope of the Contract. Finally, the Claimants sold the cabinets left behind by the Respondent for $1,000.00, which should be taken into consideration.

The evidence is clear that the Claimants paid the Respondent a total of $66,500.00. The parties amended the Contract three times, bringing the Contract price to $58,500.00.[6] The

[6] The original Contract amount was $60,000.00. The Parties amended this to add $1,500.00 for a Mitsubishi heater and to add $5,000.00 to install a load bearing beam. The Parties also amended the contract to remove the purchasing of the granite for which the Respondent would refund $8,000.00. $60,000.00 + $1,500.00 + $5,000.00 = $66,500.00 - $8,000.00 = $58,500.00.

Claimants paid an additional total of $34,889.69 to date to complete the work under the project. One of the amendments to the Contract was to remove the cost of the granite in exchange for a refund of $8,000.00. Because of this, I will not include the cost of the granite in these calculations. However, I note that the Respondent did not refund the Claimants the agreed upon $8,000.00, therefore the $8,000.00 remains a part of the $66,500.00 that the Claimants paid to the Respondent. Using the formula provided in COMAR 09.08.03.03B(3)(c) as a basis, the Claimant's actual loss is $42,889.69.[7] However, from this amount I shall subtract the $1,000.00 that the Claimants received for the sale of the unwanted cabinets that the Respondent did not take back, making the Claimants' actual loss $41,389.69..

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 $41,389.69 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).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of $20,000.00 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). I further conclude that the Claimants are entitled to recover $20,000.00 from the Fund. COMAR 09.08.03.03D(2)(a).

[7] $66,500.00 + $34,889.69 = $101,389.69 - $58,500.00 = $42,889.69.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants $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;[8] and

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

December 10, 2020
Date Decision Issued

Mary Pezzulla
Administrative Law Judge

MP/at
#188662

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

PROPOSED ORDER

WHEREFORE, this 15th day of March, 2021, 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