

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF ISRAEL MILLER,</b></p> <p><b>CLAIMANT,</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF IONITA MARCELLA</b></p> <p><b>RUTHERFORD t/a L.A.W.</b></p> <p><b>CONSTRUCTION &amp; DESIGN, LLC,</b></p> <p><b>RESPONDENT</b></p>	<p><b>* BEFORE KIMBERLY A. FARRELL,</b></p> <p><b>* AN ADMINISTRATIVE LAW JUDGE</b></p> <p><b>* OF THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>* OAH NO.: DLR-HIC-02-11- 36944</b></p> <p><b>* MHIC NO.: 09 (05) 1187</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p>
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**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

On September 3, 2009, Israel Miller (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$62,037.00 for actual losses allegedly suffered as a result of a home improvement contract with Ionita Marcella Rutherford t/a L.A.W. Construction & Design, LLC, (Respondent).

I held a hearing on July 16, 2012, at the Office of Administrative Hearings, 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2012).

Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent failed to appear after due notice was sent to her address of record. At the close of the hearing, the Fund requested that the record be left open an additional four days for the Fund to submit certain records that might benefit the Claimant. Those records were timely submitted and the record closed on July 20, 2012.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

### **ISSUE**

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted all but one of the exhibits submitted by the Claimant as follows:

- CLMT #1 Contract for home improvement between the Claimant and the Respondent, November 1, 2007
- CLMT #2 Correspondence from the Claimant to the Respondent, January 24, 2008 and April 30, 2008; Memorandum regarding "Last Chance Agreement," June 8, 2008; correspondence from the Claimant to the Respondent, July 21, 2008
- CLMT #3 Photocopies of the fronts and backs of cancelled checks written by the Claimant to the Respondent and other entities
- CLMT #4 Alpha Building & Contracting Contract, February 4, 2009
- CLMT #5 Not admitted
- CLMT #6 Information regarding permits for the home improvement at 1416 W. Pratt Street, Baltimore, Maryland
- CLMT #7 Zeskind's Hardware quote for windows, January 16, 2009

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

- Fund #1 Notice of Hearing, with attachments; Hearing Order, September 13, 2011
- Fund #2 MHIC licensing record for the Respondent
- Fund #3 Home Improvement Claim Form, received by the MHIC September 3, 2009
- Fund #4 Correspondence from the MHIC to the Respondent, October 9, 2009
- Fund #5 Correspondence from the MHIC to the Respondent, December 7, 2009
- Fund #6 MHIC records under seal, with accompanying cover letter from Mr. King, July 19, 2012<sup>1</sup>

The Respondent was not present to offer any exhibits.

### Testimony

The Claimant testified on his own behalf. No other witnesses were called.

### **FINDINGS OF FACT**

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

1. The Respondent was a licensed home improvement contractor under MHIC license number numbers 01-96611 (her individual license) and 05-126294 (her corporate license) from June 16, 2008 through June 16, 2010.
2. On November 1, 2007, the Claimant and the Respondent entered into a home improvement contract. The Claimant had purchased 1416 West Pratt Street in Baltimore City. The property had been badly damaged in a fire. The home improvement contract called for the Respondent to demolish and remove fire-damaged portions of the house and to rebuild it. The contract included, but was not limited to: demolition, debris removal, framing, roof work, window installation, heating and air conditioning, plumbing, insulation, carpeting, tiling, changing all lighting fixtures through out the house, installation of sheetrock, painting, and trim and finish work. The contract did not state when work would begin, but set February 28, 2008,

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<sup>1</sup> Fund #6 was submitted after the hearing, as the Fund requested that the record remain open and I granted the request.

as the date the job would be completed. The Claimant lived nearby, but intended to make this property his home after renovations were complete.

3. The original agreed upon contract price was \$75,000.00.

4. The Respondent was recommended to the Claimant. The Claimant did not seek estimates from other companies for this work.

5. The Respondent began work around the first of January 2008 and for the first couple of weeks, work proceeded well. The Respondent then disappeared. She did not perform any home improvement work for several weeks and could not be reached. She then reappeared at the work site and performed part of the contract.

6. The Claimant paid the Respondent the first draw of \$11,000.00 on December 18, 2007.<sup>2</sup> He subsequently paid \$9,123.00 to the Respondent on January 12, 2008. Between approximately January 7 and January 29, 2008, no work was performed and the Respondent did not communicate with the Claimant.

7. The Claimant paid the Respondent \$9,123.00 on February 15, 2008. About ten days later the Respondent requested additional monies. No work was performed between February 15, 2008 and the date of her request for additional funds. When asked about this, the Respondent advised that she was ahead of schedule and had to pay her subcontractors to catch up. The Claimant paid the Respondent \$6,000.00 on February 26, 2008. He made another payment of \$13,000.00 on March 18, 2008.

8. The Claimant paid the Respondent \$10,000.00 on April 11, 2008. Between April 11, 2008, and April 30, 2008, no work was done by the Respondent or anyone on her

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<sup>2</sup> The payments were documented by the Claimant by way of copies of the fronts and backs of cancelled checks. The amounts paid to the Respondent do not match the dollar amounts set forth in the draw schedule accompanying the original contract.

behalf. The Claimant made five phone calls to the Respondent seeking updates in these weeks. The Respondent did not return any of the Claimant's calls or communicate with him during this period.

9. The Claimant continued to call, fax, and send mail to the Respondent. The Respondent did not re-establish contact with the Claimant until May 30, 2008.

10. At that time, the Claimant drafted a "Last Chance Agreement." The document recited some of the history between the parties and set forth new ground rules for progress reports and other matters. The parties signed that agreement on June 3, 2008.

11. Between June 3, 2008, and July 21, 2008, the Respondent installed staircases, but did no other work.

12. On or about July 21, 2008, the Claimant sent a letter to the Respondent advising her of his intention to terminate their contract and file suit against her.

13. This spurred the Respondent to perform work for about ten days or so, followed by a month of very inconsistent performance.

14. On September 3, 2008, the Claimant paid the Respondent \$3,850.00. He also purchased approximately \$4,000.00 worth of materials from Home Depot. The Respondent was supposed to pick up the materials from Home Depot the next day; however, she did not actually pick them up until November 2008. No work was performed between September 3, 2008 and November 2008.

15. After picking up the material from Home Depot, the Respondent had one person hanging drywall by himself in the three-story house. The Respondent gave the person a bad check and blamed it on the Claimant, telling the subcontractor that the Claimant had not paid for the work. The Claimant personally paid the subcontractor to finish the drywall.

16. The Claimant again made efforts over the next several weeks to establish contact with the Respondent, but was unsuccessful. No further work was performed by the Respondent or anyone on her behalf during this time.

17. On or about December 15, 2008, the Claimant called the Respondent from a phone number that she would not recognize as belonging to him. The Respondent answered the phone. After a conversation, the Respondent advised that she was not going to complete the contract. Approximately one week later, the Claimant and the Respondent spoke again. In this conversation the Respondent agreed to return the materials she had picked up at the Home Depot but had not used on the job. These materials included, among other things, a hot water heater, heating and air conditioning units, wood windows, bathroom fans, mud, paint and primer.

18. The Respondent agreed to deliver the material to the property, but never returned anything to the Claimant.

19. The Respondent installed vinyl windows in the front of the house. Because the property is in an historic area, the front windows must be wood, so the Respondent's work had to be taken out and redone.

20. The Respondent left the job incomplete.

21. The Claimant obtained an estimate from Alpha Building & Contracting dated February 4, 2009. The contract provided that Alpha would tear out drywall installed by the Respondent to check on items including electrical and plumbing work, and would then complete the remodeling that was supposed to have been done by the Respondent. The contract also called for a modest amount of work that was not contemplated by the original contract between the

Claimant and the Respondent, including installation of fifty-five linear feet of fence, and creation of a patio and walkway.<sup>3</sup> The contract total was \$71,077.00.

22. The Claimant no longer owns the property. Foreclosure proceedings were instituted and the property was sold at a foreclosure auction for approximately \$25,000.00.

23. The original contract contained a provision regarding arbitration of disputes:

In the event that a dispute arises with respect to any of this agreement, the parties agree to first submit the matter to the Consultation Consultant [sic] for determination.<sup>4</sup> In the event that either parties [sic] is dissatisfied with the determination of the Construction consultant, such party agrees to submit the matter to binding [sic] arbitration under the in the rules [sic] promulgated by the American Arbitration Association in substitution for a lawsuit in any court of this or other state.

CLMT #1, section 9.05, pg. 3.

24. The "Last Chance Agreement" executed by the parties on June 3, 2008, contained the following language: "Paragraph 9.05 "Arbitration of disputes" and any other mention of arbitration in the original contract between both parties is deemed null and void and stricken from the contract." CLMT #2.

25. After being directed to do so by the MHIC, the Claimant tried to contact the Respondent to engage in arbitration. The Respondent did not respond.

26. By letter dated December 7, 2009, the MHIC sent notice to the Respondent that it had received evidence that she had rejected or ignored good faith efforts by the Claimant to submit the dispute to arbitration. The letter further advised the Respondent that if she did not respond

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<sup>3</sup> The Claimant's written contract with the Respondent does not include any provisions covering fencing of the property. The Claimant testified that although there is no language about it in the contract, the Respondent was supposed to enclose the yard.

<sup>4</sup> Article 3 of the contract has a provision captioned, "Architect and Owner's Construction Consultant." It reads, "The project has been designed by the owner and will be MANGED [sic] by [the Respondent] Who act [sic] as OWNERS representatives, as set forth hereafter, and who shall now be known as CONSTRUCTION CONSULTANT."

within twenty-one days agreeing to submit the dispute to arbitration, the MHIC would consider her to have waived the arbitration clause.

27. The Respondent did not respond to the MHIC letter.

28. During the relevant period, the Respondent was also doing work on another property for the Claimant.

### DISCUSSION

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) (Supp.2011). *See also* COMAR 09.08.03.03B(2). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401 (2010).

The first hurdle for the Claimant is the fact that the Respondent was not a licensed contractor at the time the parties entered into the contract for home improvement at issue in this case. This is not automatically fatal to the Claimant’s case. COMAR 09.08.02.01(D)(3)(d) provides as follows:

(d) The hearing board may dismiss a claim as legally insufficient if the contractor was unlicensed when the contract was entered into but licensed during the performance of the contract unless:

(i) The claimant establishes by a preponderance of the evidence that the claimant did not know that the contractor was unlicensed at the time the contract was entered into; and

(ii) A substantial portion of the contractor’s alleged misconduct occurred after the contractor became licensed.

As is almost always the case, the Claimant’s grasp on the dates and facts of the case is weakened by the passage of about four to five years since the events at issue and by the fact that the Respondent was working on more than one job for him at the relevant time. The Claimant



initially testified that he had checked around the time the contract was entered into and the MHIC website listed the Respondent as licensed at that time. In fact, the Respondent was not licensed until about seven months later. After reflection, the Claimant revised his testimony to state that he probably had not checked the MHIC website until the project had gotten very off-track. When he did eventually check, the Respondent was licensed. I credit the Claimant's honesty, even though he was mistaken about his initial testimony. The Claimant also testified that the Respondent told him she was licensed. There was no date attached to this statement, so I am unable to determine whether the Respondent lied to the Claimant on this point, or was not asked until after she could honestly report that she was licensed. I do find, however, that the Claimant has established by a preponderance of the evidence that he did not know that the Respondent was unlicensed when he entered into the contract with her.

The Claimant must also establish that "a substantial portion of the contractor's alleged misconduct occurred after the contractor became licensed." COMAR 09.08.03.02(D)(3)(d)(ii). First it must be determined whether the Respondent engaged in any misconduct, which in this case means whether she performed unworkmanlike, inadequate, or incomplete home improvement. Clearly, she did.

The Respondent agreed in the contract that this home improvement project, which was major in scope, would be completed by February 28, 2008. When she finally abandoned the job, in December 2008—some ten months after the promised completion date—it was nowhere near complete. In between, she disappeared for weeks or months at a time and deliberately failed to communicate with the Claimant for lengthy periods of time despite his extensive efforts to reach her. She installed vinyl windows that were prohibited on the front of the house due to the house being in an historic district. At the end, she stole almost \$4,000.00 worth of material from the

Claimant by picking up material the Claimant had paid for from Home Depot and agreeing to but ultimately failing to return it to him once she told him she would not perform further work under the contract. The Respondent's performance under the contract was unprofessional, inadequate, and incomplete. The issue of whether it was unworkmanlike is further discussed below.

Once the Claimant establishes that there has been misconduct by the Respondent, who was originally unlicensed but became licensed while performing under the contract, the question shifts to whether the Claimant proves by a preponderance of the evidence that a "substantial portion" of the misconduct occurred after the contractor became licensed. COMAR 09.08.03.02(d)(3)(d)(ii). "Substantial portion" is not a defined term.

The Claimant necessarily took the implicit position that he had proven this. The Fund agreed that a substantial portion of the misconduct occurred after the Respondent became licensed. To review, the contract was signed in November 2007. For various reasons, including the Claimant waiting to get his funding in order and the Respondent working on other jobs, this project was not actually started until January 2008. Communication and work moved by fits and starts up to June 3, 2008, the date the parties executed the "Last Chance Agreement."

Shortly thereafter, on June 16, 2008, the Respondent became a licensed contractor. After that point she worked on the property to install the stairs. After another break with no work, the Respondent worked consistently for about ten days, followed by thirty days of intermittent work. In early September, the Claimant made a payment of \$3,850.00 to the Respondent. She agreed to pick up material from Home Depot on September 4, 2003. Instead, she did not pick up the material until sometime in November. She then assigned a subcontractor to hang drywall. After a conversation with the Claimant where he expressed his frustration and disappointment, the Respondent advised the Claimant that she would not complete the contract. She retained nearly

\$4,000.00 worth of material that the Claimant had paid for personally. I find that a “substantial portion” of the misconduct occurred after the contractor was licensed. Specifically, she accepted payment after that date, abandoned the contract after that date, and stole material from the Claimant after that date. Despite the fact that the project was ten months past its due date, the Claimant was still trying to work with the Respondent when she advised him that she would not perform any additional work. The Claimant made good faith efforts to keep the contract intact and keep the home improvement moving forward.

The Claimant has proven the necessary elements to avoid having his claim dismissed as legally insufficient. Before turning to an analysis of actual damages, I will detour into the issue of the original contract’s provision requiring binding arbitration.

The original contract contemplated binding arbitration between the parties if disputes arose. The “Last Chance Agreement” signed by both parties on June 3, 2008, appears to be a valid agreement to delete this provision from the original contract. Regardless, the MHIC advised the Claimant that he should attempt arbitration with the Respondent and he made good faith efforts to get her to engage in the process but received no response. The MHIC then notified the Respondent that it believed that she had rejected or ignored good faith efforts to abide by the arbitration clause and that unless she responded by December 28, 2009, it would consider her to have waived her right to arbitration. The Respondent did not reply. I find that either because the parties entered into a valid agreement to delete the arbitration requirement from their original contract or because the Respondent ignored or rejected good faith efforts by the Claimant to fulfill the requirements of the arbitration clause, the case is ripe for decision without being submitted for arbitration.

Turning then to the issue of actual damages, the Claimant's case was generally strong, but lacking in detailed specifics in some areas. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations offer three formulas for measurement of a claimant's actual loss, but also acknowledge that in some cases, a unique approach must be taken to appropriately calculate the Claimant's actual loss. COMAR 09.08.03.03B(3) reads as follows:

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(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.

The first formula is not appropriate for this case. The Respondent did not simply take money and abandon the contract without doing any work.

The second formula contemplates that a claimant is not attempting to have another contractor complete the original contract, but is leaving the property as the first contractor left it or is completing the work himself or herself. The instant facts bear superficial resemblance to this scenario. The Claimant is no longer soliciting another contractor to complete the original

contract. He originally intended that another contractor would complete the contract. He solicited several contractors to come to the property to give estimates. Some were not willing to take up where the Respondent left off for various reasons. Ultimately, Alpha provided an estimate, but the Claimant had too much money tied up in the Respondent's hands. This situation contributed to financial problems that eventually resulted in the Claimant being unable to keep up with the payments on the property and it was lost to foreclosure. Formula two does not really fit the facts of this case.

The third formula is for situations where the contractor performed some work called for by the contract and a claimant is soliciting another contractor to complete the job. This formula represents what the Claimant intended and tried to accomplish, but cannot do now that the property is no longer his.

The Fund suggested that a unique measure of actual loss best fit this set of facts. In essence, it suggested that as a unique measure of actual damage in this case, the available numbers should be calculated according to the third formula even though it is clear at this point that the Claimant will not be paying another contractor to complete the job. The Fund believed that whether this approach was used or the second formula was applied to this case, being the standard formula which most closely matched the facts, the Claimant's actual loss would far exceed the \$20,000.00 limit for an award.

~~The Claimant provided receipts for paying the Respondent \$62,096.00. He testified~~  
credibly about the materials he purchased at Home Depot which were taken by the Respondent, although he did not have receipts for that expenditure. That total was \$4,000.00. The total the Claimant paid to or on behalf of the contractor was \$66,096.00. The Alpha estimate was for \$71,077.00. The Alpha estimate contained at least two items that were not a part of the

Claimant's contract with the Respondent. Alpha was to furnish and install fifty-five linear feet of wood fence. The Claimant believes the Respondent was obligated to perform this work, but acknowledges it was not in the written contract. Alpha also agreed to install a concrete patio and walkway consisting of 190 square feet. These items are not separately priced out in the Alpha estimate. The Fund posited in argument that this portion of the contract would be unlikely to exceed a few thousand dollars.

Setting aside the question of these differences in the contracts for the moment, the amount paid to the contractor plus the Alpha estimate totals \$131,173.00. Subtracting the original contract price of \$75,000.00 puts the Claimant's actual losses at \$62,173.00. However, the Claimant is entitled to only a portion of his actual loss from the Fund. Pursuant to Md. Code Ann., Bus. Reg. §8-405 (a) and (d) (Supp. 2012), the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. The difference between the Claimant's actual calculated loss of \$62,173.00 and his maximum Fund recovery of \$20,000.00 is \$42,173.00. So long as the cost of the patio and the fence do not exceed \$42,173.00, it is fair to award the Claimant \$20,000.00. I am confident, despite the fact that the Alpha estimate is not individually priced out by item, that these two small items do not exceed that limit.

#### **CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained a compensable loss of \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

**RECOMMENDED ORDER**

**I PROPOSE** 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 at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

**Signature on File**

September 24, 2012  
Date Decision Mailed

  
\_\_\_\_\_  
Kimberly A. Farrelly  
Administrative Law Judge



KAF/kkc  
Document #137318

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**FILE EXHIBIT LIST**

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July 19, 2012

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