

**The Maryland Home
 Improvement Commission**

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**BEFORE THE
 MARYLAND HOME IMPROVEMENT
 COMMISSION**

**v. Anthony Hill
 t/a Ant Hill Construction
 (Contractor)
 and the Claim of
 Pamela Miller
 (Claimant)**

MHIC No.: 15 (90) 70

FINAL ORDER

WHEREFORE, this 6th day of July 2017, Panel B of the Maryland Home

Improvement Commission ORDERS that:

- 1. The Findings of Fact set forth in the Proposed Order dated February 15, 2017 are AFFIRMED.**
- 2. The Conclusions of Law set forth in the Proposed Order dated February 15, 2017 are AFFIRMED.**
- 3. The Proposed Order dated February 15, 2017 is AFFIRMED.**
- 4. This Final Order shall become effective thirty (30) days from this date.**
- 5. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**

Joseph Tunney
 Joseph Tunney, Chairperson
 PANEL B

MARYLAND HOME IMPROVEMENT COMMISSION

<p>IN THE MATTER OF THE CLAIM</p> <p>OF PAMELA MILLER,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF ANTHONY HILL,</p> <p>T/A ANT HILL CONSTRUCTION</p> <p>RESPONDENT</p>	<p>* BEFORE GERALDINE A. KLAUBER</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: DLR-HIC-02-16-19286</p> <p>* MHIC No.: 15 (90) 70</p>
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PROPOSED DECISION

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

STATEMENT OF THE CASE

On February 25, 2016, Pamela Miller (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$ 5,985.00 in alleged actual losses suffered as a result of a home improvement contract with Anthony Hill, trading as Ant Hill Construction (Respondent).

I held a hearing on September 23, 2016 at the Largo Government Center, Largo, Maryland Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented

herself. Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); 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 that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 – Claimant's contract with the Respondent, March 11, 2007
- Clmt Ex. 2. - Building Inspector of America Report, May 7, 2014
- Clmt. Ex. 3 - Investigative Report of Global Forensic Investigations, June 23, 2014
- Clmt. Ex. 4 - McKenzie Engineering Services Report, January 7, 2015
- Clmt. Ex. 5 - JES Construction Proposal, February 26, 2016
- Clmt Ex. 6 - Photograph of wall prior to Respondent's renovations
- Clmt Ex. 7 - Photograph of area after Respondent's renovations

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

- Resp. Ex. 1 - Global Forensics Investigations Report, September 21, 2016

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notice of Hearing, July 20, 2016

Fund Ex. 2 - Hearing Order, June 17, 2016

Fund Ex. 3 - Licensing History of Respondent, August 9, 2016

Fund Ex. 4 - Home Improvement Claim Form, February 25, 2016

Testimony

The Claimant testified in her own behalf. The Respondent testified in his own behalf.

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 01-43993.
2. The Claimant resides in a three level townhome that was constructed approximately 28 years ago.
3. On or about March 14, 2007, the Claimant and the Respondent entered into a contract to demolish and remodel the Claimant's existing basement.
4. The original agreed-upon contract price was \$35,225.00
5. The Claimant paid the Respondent the full contract price.
6. The Respondent completed the work under the contract in 2007.
7. The Respondent removed a cross-wall in the basement in order to provide a larger opening. The original opening was approximately 3 feet and was widened to approximately seven to eight feet.
8. The Respondent did not install a structural beam across the new wider opening.

9. In May 2014, the Claimant hired a contractor to replace the tile in the foyer of her home. The contractor noticed that the floor was not level and suggested that it was due to the removal of the load bearing wall in the basement.

10. Prior to 2014, the Claimant did not notice any issues other than some hairline cracks in some walls.

11. The Claimant notified the Respondent of the issues related to the removal of the wall in the basement. The Respondent denied removing a load bearing wall during the renovations.

12. The Claimant hired The Building Inspector of America to perform an inspection of her home and draft a report, specifically in regards to the Respondent's renovations and the removal of the basement cross-wall.

13. On May 7, 2014, The Building Inspector of America inspected the Claimant's home.

14. On June 9, 2014, Global Forensic Investigations, an engineering firm, performed an inspection of the Claimant's home on behalf of the Respondent.

15. On November 24, 2014, a structural engineer with McKenzie Engineering Services, P.C. performed an inspection of the Claimant's home related to evaluate conditions related to the Respondent's removal of the cross-wall in the basement.

16. During renovation of the Claimant's basement, the Respondent removed a cross-wall that was load bearing. The Respondent did not install a structural beam in the opening where the wall had been removed. The Respondent's actions created a defect in the floor framing resulting in sagging of the ceiling above and cracks.

17. In order to rectify the issues, the floor framing in the area of the enlarged opening needs to be jacked back up to a level condition and a new structural beam must be installed across the opening.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of [his/her] claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).¹ “[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 (3rd ed. 2000).

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Md. Code Ann., Bus. Reg. § 8-405(a) (2015);² *see also* COMAR 09.08.03.03B (2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. In 2007, the Respondent demolished and renovated the Claimant's basement. The Claimant did not notice any problems with the Respondent's work

¹ As noted above, “COMAR” refers to the Code of Maryland Regulations.

² Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

until 2014 when she hired a contractor to replace the tile in the foyer. The contractor alerted the Claimant that her floor was uneven and suggested that it was due to the removal of the load bearing wall below the foyer in the basement. The Claimant hired Building Inspector of America, a home inspection company, to investigate further.

On May 7, 2014, Building Inspector of America performed the inspection and drafted a report. Based upon its inspection, Building Inspector of America concluded that the double header and wall had been removed from the basement center bearing wall which allowed for the floor truss to sag causing major settlement cracks to open.

The Claimant notified the Respondent of the results of the home inspection. The Respondent denied removing a support beam and contacted his insurance company that in turn hired an engineering firm to inspect the Claimant's home. Global Forensic Investigations (Global) performed an inspection of the Claimant's residence on behalf of the Respondent on June 9, 2014. Global documented its findings in a June 23, 2014 report. Global concluded that the subject wall that was removed from the Claimant's basement was not a load bearing wall. In reaching its conclusion, Global relied on the fact that there was no squash blocking in the wood frame trusses above the removed wall to suggest that the wall had once carried a structural load. Further, Global relied on the Respondent's representation that he had not removed a load bearing wall and the renovation plans submitted and accepted by Prince George's County made no mention of the removal of a load bearing wall. Global's report further explained that upon inspection there were no visible cracks in the deflected basement ceiling around the removed wall's location that were consistent with recent and sudden movement. The absence of cracks in the drywall around the removed wall suggested that the ceiling had not moved or displaced significantly due to the removal of the wall back in 2007. Global noted deflections were found in

other areas of the basement ceiling away from the removed wall, which showed no signs of cracks or recent or sudden movement. The deflections caused a depression in the foyer floor but were not caused by the removal of the wall but rather occurred over time due to the home's construction. The cracks found in the home had varying ages and had occurred over time due to the house's construction and natural building movements and not caused by the removal of the wall. There were no cracks in the drywall around the removed wall, which suggest that the cracks in other regions of the house were unrelated.

In response to Global's finding, the Claimant hired an engineer to provide a second opinion. On November 24, 2014, McKenzie Engineering Services, P.C (McKenzie) inspected the Claimant's home. In addition to the site inspection, McKenzie reviewed the contract between the Claimant and Respondent, Global's report, the Building Inspector of America's home inspection report, original construction drawing for a neighbors basement layout, which was the same layout as the Claimant's basement, photographs of basement prior to renovations. Based on all of the gathered information and the site inspection, McKenzie concluded that the cross-wall removed by the Respondent was a load bearing wall and major support point for both the first and second floor trusses. McKenzie further concluded that the removal of the wall and failure to install a structural beam created a defect in the floor framing and recommended that to correct the issue the floor framing in the area of the enlarged opening needed to be jacked back up to a level condition and a new structural beam be installed across the opening.

The Respondent presented several arguments in response to the Claimant's claim. First, he argued that some of the photographs in the Global report show massive cracks in the walls, some of which had obviously been repaired, and, therefore the Claimant should have been aware

of the problem prior to 2014. The Claimant's right to recover is subject to the statute of limitations set forth in Business Regulations Article §8-405, as follows:

(g) Limitations period. – A claim shall be brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage.

Generally, when limitations is asserted as an affirmative defense barring a remedy, the party asserting the statutory bar bears the burden of proving the applicability of the statute.

Newell v. Richards, 323 Md. 717 (1991). Nevertheless, in cases such as this, in which commencement of the suit within the statutory period is a prerequisite to a claimant prevailing on a claim, the claimant has the burden of proving that his or her claim was filed within the requisite period. *Id.*; *Comptroller v. World Book Childcraft*, 67 Md. App. 424, 508 (1986).

Business Regulations Article § 8-407(e) expressly provides that the Claimant bears the burden of establishing entitlement to recovery from the Fund, and filing within the statutorily required three-year period is set forth in Business Regulations Article § 8-405(g) as a prerequisite with which a claimant must comply in order to recover. Accordingly, the Claimant here bore the burden of proving that she filed her claim with the Fund within three years after she discovered or, by use of ordinary diligence, should have discovered the loss or damages claimed.

While it appears that the lapse of seven years between the time the home improvement was completed and when the Claimant filed her claim presents an obvious statute of limitations issue for the Claimant, the Claimant testified credibly that she did not notice any issues relating to the sagging floor/ceiling until she was alerted to the issue by the contractor replacing tile in her foyer in 2014. While she did not specifically testify that she did not notice any cracks in the home prior to 2014, I do not find it unreasonable that a layperson, totally unfamiliar with the construction of homes, would associate the cracked walls with the basement renovation and

removal of a cross-wall. The Claimant's testimony that she had no prior knowledge about load bearing walls was credible. Therefore, I find that the Claimant's failure to discover the issue until 2014 was not due to any lack of diligence and she filed her claim with the Fund within three years of discovery of the claimed damage.

The Respondent's second argument was that the nature of the existing structural defects in the home does not support a finding that they were caused by the removal of the wall in the basement. He argued that the numerous cracks present throughout the house are indicative of a long standing on-going process that was unrelated to the basement renovations. In support of this assertion, the Respondent relied upon the second report generated by Global in response to the findings of McKenzie's engineer. This September 21, 2016 report rebutted McKenzie's findings by noting that the majority of cracks found around the residence were not in the direct loading path with the general location of the removed wall. It further noted that the heavy snow falls in 2003, 2006 and 2010 and an earthquake experienced in the region would have stressed the wood framing from the roof to foundation and caused similar cracks. According to Global's second report, the basement's ceiling deflection accompanied by little cracking indicated that the ceiling trusses were sagging prior to the gypsum board ceiling installation during renovations.

This case turns on the testimony of the two competing engineer reports. Unfortunately, neither party brought in the author of the reports to provide testimony and additional insight into the conclusions reached. After careful review of the two reports, I have given greater weight to the McKenzie report and conclusion than Global's report for the following reasons.

According to the Respondent, Greg Eberhardt entered into the contract with the Claimant using the Respondent's MHIC number without his knowledge or authorization. The Respondent testified that Eberhardt was a prior employee, who last worked for him in 2004. According to the

Respondent, he found out about the contract only because at some point the Claimant forwarded to him payments for the work. The Respondent admitted, however, that he agreed to accept responsibility for the work performed at the Claimant's home. Part of Global's conclusion that the removed wall was not load bearing was based upon the Respondent's representations about the status and location of the wall at the time of the renovations. The report specifically states,

[t]he insured (anthill Construction) claimed that the intermediate blocking was not present where the wall was removed, whereupon he concluded that the wall was not load bearing. Both the insured and Global Forensic saw vertical blocking in the open webbed trusses, but not where the insured or claimant thought the wall was removed, whereupon the insured and we concluded the original wall was not a load bearing wall. (Resp. Ex 1)

The report further states:

Further, the McKenzie report assumed a header beam was part of the wall that was removed, although the insured does not recall any framing that resembled a header beam during demolition. We cited the insured in our original report when he said he did not find intermediate bearing blocking or any field alterations to the open webbed trusses resembling intermediate bearing blocking above the basement wall during removal. (Resp. Ex. 1)

However, the Respondent asserted that he did not perform the work in question and did not receive payment on the contract until later in the renovation. I inferred that the Respondent's knowledge of the renovation was after demolition had been completed. Thus, it was not explained how the Respondent made any of the above referenced observations during demolition if he was not even aware of the existence of the contract. Because the Global report relied in part on the Respondent's representations, I do not find the report inherently reliable. On the other hand, the McKenzie report provided a detailed and reasonable basis for the conclusion that the issues with the Claimant's sagging basement ceiling and cracks throughout some areas of the house were due to the Respondent's removal of a load bearing wall. In this regard, the Respondent performed unworkmanlike home improvements. I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. 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 provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case.

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)

McKenzie concluded that to rectify the situation the floor framing in the area of the enlarged area needed to be jacked up to a level condition. The Claimant obtained an estimate to have the recommended remedial action taken. In February 2016, the Claimant obtained an estimate from JES Foundation and Crawlspace Basement Repair in the amount of \$4,750.00. Using the required formula for calculating the Claimant's actual loss I have calculated the Claimant's actual loss as \$4,750.00.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss \$4,750.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$4,750.00; 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;³ and

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

Signature on File

December 2, 2016
Date Decision Issued

GAK/sw
165396

Geraldine A. Klauber
Administrative Law Judge



³ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 15th day of February, 2017, 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.

Sachchida Gupta

***Sachchida Gupta
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION