

**IN THE MATTER OF THE CLAIM
OF MARGARET HAYWOOD,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF GREGORY STOTTS,
T/A GROUND UP HOME SOLUTIONS
L.L.C.,
RESPONDENT**

*** BEFORE STUART G. BRESLOW
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-17-15616
* MHIC No.: 16 (05) 1458

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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 August 22, 2016, Margaret A. Haywood (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$8,000.00 in alleged actual losses suffered as a result of a home improvement contract with Gregory Stotts, trading as Ground Up Home Solutions, L.L.C. (Respondent).

I held a hearing on August 31, 2017 at 1400 McCormick Drive, Largo, Maryland 20774. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented herself.

Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Anthony M. Shore, 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 Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); 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 Signed contract proposal between the Claimant and the Respondent, dated March 5, 2016
- Clmt. Ex. 2 Check #1283 in the amount of \$8,000.00 payable to the Respondent, dated March 9, 2016
- Clmt. Ex. 3 Summary of communications between the Claimant and the Respondent from March 8, 2016 through June 21, 2016
- Clmt. Ex. 4 Drawing of basement sent by Respondent to Claimant, dated April 7, 2016
- Clmt. Ex. 5 Email from Claimant to Respondent with choice of doors, dated April 12, 2016
- Clmt. Ex. 6 Email from Claimant to Respondent, dated April 18, 2016
- Clmt. Ex. 7 Email from Respondent to Claimant, dated April 18, 2016
- Clmt. Ex. 8 Email from Claimant to Respondent, dated April 18, 2016

- Clmt. Ex. 9 Telephone transcript of voicemail left by D'Anna Whalen, representative of Respondent, on Claimant's cell phone, dated April 19, 2016
- Clmt. Ex. 10 Email from Respondent to Claimant, dated April 28, 2016
- Clmt. Ex. 11 Email from D'Anna Whalen to Claimant, dated April 29, 2016
- Clmt. Ex. 12 Telephone transcript of voicemail left by Sarah, Respondent's representative, on Claimant's cell phone, dated June 2, 2016
- Clmt. Ex. 13 Email from D'Anna Whalen to Claimant, with attached scope of work, dated June 7, 2016
- Clmt. Ex. 14 Handwritten note from Respondent, undated

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

- Resp. Ex. 1 Change Order Form, dated May 26, 2016

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Notice of Hearing, dated July 24, 2016
- Fund Ex. 2 Hearing Order, dated March 17, 2016
- Fund Ex. 3 Licensing History for the Respondent, dated July 21, 2017
- Fund Ex. 4 Home Improvement Claim Form, received by Department, August 22, 2016
- Fund Ex. 5 Letter from Kevin Neibuhr, Investigator, MHIC to Respondent, dated September 22, 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 102832.

2. On March 5, 2016, the Claimant and the Respondent entered into a contract (Contract) to build a bathroom and install a closet, carpeting and ceiling lights (Project) in the Claimant's basement. The Contract included that work would begin on April 15, 2016 and be completed by June 1, 2016.

3. The original agreed-upon Contract price was \$25,000.00. When a contract is entered into by the Respondent, he includes in the price of the contract an amount for profit and for the cost of materials and labor.

4. On March 8, 2016, the Claimant requested that the Respondent reduce the price of the Project by \$5,000.00 and use that savings to replace her front, storm, kitchen and basement doors (Revised Project). In order to reduce the price of the Project, certain items identified in the Contract would have to be deleted.

5. On March 9, 2016 the Claimant paid the Respondent \$8,000.00 as a deposit pursuant to the Contract.

6. The Claimant was away for two weeks on a business trip and informed the Respondent on April 4 that she was back from her trip.

7. On April 7, 2016, the Claimant received a drawing of the proposed Revised Project that was created by an outside contractor, Haywood Renovation. The drawing was paid for by the Respondent.

8. On April 11, 2016, the Respondent provided the Claimant with a website to select the doors for the Revised Project. The Claimant sent her selections to the Respondent the following day.

9. On April 18, 2016, the Claimant inquired of the Respondent whether he had an opportunity to review her door selections. He responded that same day, hoping to finalize the selections that afternoon.

10. The following day, D'Anna Whalen, Respondent's Project Manager, left a voicemail message with the Claimant advising her that as a result of the Revised Project, the Respondent would have to remove items from the Contract to cover the cost for the Revised Project. She indicated in her voicemail message that she was still trying to work out the details, but indicated that the closet would have to be removed from the Project.

11. Due to the Claimant's travels to Trinidad and Ms. Whalen's medical emergency, Ms. Whalen advised the Claimant by voicemail on April 29, 2016 that she would try to schedule a meeting with her the following week.

12. On May 26, 2016, the Claimant was presented by Ms. Whalen with a Change Order Form for the Revised Project. By removing the closet and four recessed lights from the Project, the Respondent was able to save \$3,900.00 from the cost of the Project. Replacing the doors in the kitchen, basement, storm door and front door, would add \$5,901.38 to the cost of the Revised Project, thereby resulting in an additional cost for the Revised Project of \$2,001.38. The Claimant never signed the Change Order Form to document her approval for the Revised Project.

13. The Claimant requested a scope of work from the Respondent which the Respondent provided on June 7, 2016. The Claimant did not agree with a number of the items in the scope of work.

14. Measurement of the doors took place on June 13, 2016. There was a lead time to have the doors produced by the manufacturer. On June 16, 2016, the Claimant was advised by

the Respondent that he was waiting to hear about the availability of the doors from the door manufacturer.

15. The Respondent received a response from the door manufacturer shortly thereafter that they could deliver the doors to the Respondent in about three to four weeks after the July 4th holiday.

16. The Respondent was always willing to perform the Revised Project provided the Claimant agreed to the change order.

17. The Claimant did not want to pay more for the Revised Project than the original Contract price.

18. The Respondent would not have been able to complete the Revised Project for the original Contract price, because he would have to remove more items from the Revised Project that would ultimately prevent the Respondent from meeting building code requirements and approval of building inspectors.

19. On an unspecified date, the Claimant filed a complaint with the Department.

20. After receiving a copy of the Complaint, the Respondent spoke with the Claimant to try and reach agreement to do the Revised Project, but the Claimant only wanted her deposit money returned to her. The Claimant informed the Respondent that he could not return to her residence to work on the Revised Project.

21. The Respondent has incurred costs as a result of the Claimant's termination of the Contract.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of 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 (3d 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.” Md. Code Ann., Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. On March 5, 2016, the Claimant entered into a Contract with the Respondent to install a bathroom in the basement of her residence and to do other work in the basement as described in the Contract referred to as the Project. The total price to perform the Project was \$25,000.00. A deposit of \$8,000.00 was provided to the Respondent. Nearly contemporaneously with the execution of the Contract, the Claimant decided that she wanted to change the Scope of the Project by reducing the price by \$5,000.00 and using that savings to replace doors in her basement, kitchen, front door and install a storm door. She realized that the

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.

Project would have to be altered as a result of her request, but did not know, at the time, how much of the Project would have to be altered.

When a contract is entered into by the Respondent, he includes in the price of the contract an amount for profit and for the cost of materials and labor. When the scope of a project is reduced, his profit on the job may be reduced as well unless adjustments to the price are made. In this case, the scope of the Project was reduced and changed to the Revised Project which included doors that would have to be purchased from a third-party vendor at a cost to the Respondent. The cost for the doors was a function of the doors selected by the Claimant. In this case, the Respondent tried to accommodate the change requested by the Claimant by eliminating the closet in the basement and by reducing the amount of recessed light fixtures. This only resulted in a savings of \$3,900.00 rather than the \$5,000.00 requested by the Claimant. If the price were to be reduced further by eliminating more work from the Project scope, the Respondent's profit would have been reduced and the final job may not have passed applicable building codes. Under the circumstances, the Respondent did what he could to accommodate the Claimant's request while maintaining the opportunity to realize the same profit he anticipated when he entered the Contract, while at the same time enabling the Revised Project to pass applicable building code inspections.

The Respondent had no obligation whatsoever to make any accommodation to the Claimant. The Contract clearly provides that all changes must be in writing. The change order was provided to her in person by D'Anna Whalen. Changing the Project to the Revised Project was clearly a significant change that required approval. Since it was never approved by the Claimant, and increased her total outlay of the Contract price of \$25,000.00 to \$27,001.38, the Respondent had no obligation to proceed with the Revised Project unless the change order was

approved by the Claimant. Despite having no obligation to proceed, the Respondent was still fully prepared to complete the Project when the Claimant told him that she did not want him back to do the job.

In this case, the Respondent did not perform unworkmanlike, inadequate or incomplete home improvements. The Respondent did not start the Revised Project as anticipated in the Contract. There are several reasons for the delay. First, the Claimant changed the Project to the Revised Project. Second, the Claimant traveled for business and to Trinidad that took her away from home. During that time, the door selection had not been finalized by the Claimant and no change order had been signed. Finally, the Respondent was prepared to order the doors, having previously measured them, but since no change order had been signed, the Respondent did not proceed with the Revised Project.

The Respondent was justified in not proceeding with the Revised Project. He had already incurred costs for the drawings that an outside vendor supplied and was prepared to complete the Revised Project, even after she filed a complaint with the MHIC, had the Claimant agreed to execute the change order. This is a demonstration of good faith on the part of the Respondent, whereas the refusal by the Claimant to accept the change order, which was made solely at her request, or agree to allow the Respondent to perform the Contract, demonstrates a lack of good faith on her part. Maryland law provides that a claim against the Fund may be denied if the claimant has "unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann. Bus. Reg. § 8-405(d). The Respondent was fully prepared to perform the Project, but the Claimant insisted that it be changed to the Revised Project at the same price as the Contract. This was unacceptable to the Respondent as it would result in reducing the profit

he calculated for the Project and result in the Respondent being unable to pass building code inspections.

Accordingly, I do not find that the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement. Md. Code Ann., Bus. Reg. § 8-401. At the hearing, the Fund concurred with this assessment.

I thus find that the Claimant is not eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss of \$8,000.00. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

Signature on File

November 6, 2017
Date Decision Issued

Stuart G. Breslow
Administrative Law Judge

SGB/ej
#170379

PROPOSED ORDER

WHEREFORE, this 25th day of January, 2018, 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
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION