

<p>IN THE MATTER OF THE CLAIM OF</p> <p>ERICA DORNBURG,</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 ALI TATARI,</p> <p>T/A TATARI CONSTRUCTION, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE WILLIS GUNTHER BAKER,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-19-39722</p> <p>* MHIC No.: 19 (75) 325</p> <p>*</p>
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STATEMENT OF THE CASE

On April 16, 2019, Erica Dornburg (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$20,000.00 in actual losses allegedly suffered as a result of a home improvement contract with Ali Tatari, trading as Tatari Construction, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On November 21, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

The case was originally scheduled for March 24, 2020 but was postponed due to the COVID-19 pandemic and rescheduled for July 13, 2020. By agreement of the parties, the case proceeded as scheduled remotely. I convened a remote hearing on July 13, 2020 from the OAH in Hunt Valley Maryland, and the parties participated by video. Bus. Reg. § 8-407(e); Code of Maryland Regulations (COMAR) 28.02.01.20B. Nicholas Sokolow, Assistant Attorney General, Department of Labor (Department),¹ represented the Fund. John E. Reid, Esquire, represented the Claimant, who was present. After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. COMAR 28.02.01.23A.²

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; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of the compensable loss?

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

² Notice of the hearing was mailed to the Respondent at the address of record and his home address provided by the Virginia Motor Vehicle Administration by regular and certified mail on March 23, 2020, COMAR 09.08.03.03A(2), but were returned as unclaimed/undeliverable. However, the Respondent had actual notice of the hearing date and agreed to participate remotely in the hearing during a telephone conversation and email with Mr. Sokolow on July 7, 2020. I sent an email invitation to the Respondent to participate in the hearing prior to the hearing at the email address used by the Respondent on July 7, 2020. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice and proceeded to hear the captioned matter.

SUMMARY OF THE EVIDENCE

Exhibits

I have attached a complete Exhibit List as an Appendix.

Testimony

The Claimant testified and presented the testimony of Seth Ballard, AIA,³ of Ballard + Mensua Architects who was accepted as an expert in architecture and home remodel, and Hyo Lee, General Contractor and Principal of Millennium Homes, who was accepted as an expert in the field of general contracting.

Neither the Respondent nor the Fund presented any testimony.

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 with the MHIC.
2. On June 13, 2017, the Claimant and the Respondent entered into a contract to add an addition, pool, and pool shed on the Claimant's property, and to renovate the Claimant's existing house, involving extensive electrical and plumbing work, roofing, railings, drywall, excavation, kitchen and bathroom renovations, new flooring, HVAC, and water and sewer line replacement (Contract). The Contract stated that work would begin on September 4, 2017 and would be completed by April 1, 2018.
3. The original agreed-upon Contract price was \$576,400.00. (Clmt. Ex. 2.)
4. There were change orders that totaled \$37,180.42 (Clmt. Ex. 33), for a total contract price of \$613,580.42.

³ American Institute of Architects.

5. Between March 24, 2017 and July 29, 2018, the Claimant paid the Respondent \$550,285.07. (Cl. Ex. 39.)

6. Almost immediately following the commencement of work, the Claimant began having issues with the progress of the Respondent's work. The Respondent at times had no one working on the project and there did not appear to be anyone managing the subcontractors.

7. While there was some work happening throughout the home for months, none of the many projects were brought to completion.

8. In February 2018, the parties amended the Contract to tie smaller payments to completion of specific items and added a liquidated damages clause in the event the project was not completed by June 5, 2018.

9. Throughout June, July, and August 2018, the Claimant communicated to the Respondent the deficiencies in the work and the incompleteness of the majority of the project items. The Respondent requested more funding in order to complete the project, despite having been paid \$550,285.07 by July 12, 2018. (Cl. Ex. 39.)

10. The Respondent's subcontractors contacted the Claimant from May through August 2018 seeking payment directly from her for work they had completed because they had not received compensation from the Respondent, despite the Claimant already having paid the Respondent for these items.

11. On August 14, 2018, the Claimant's architect, Seth Ballard, sent the Respondent an email with an extensive list of all the items in need of repair or completion per the Contract, including plumbing, electrical, floors, bathrooms, windows and doors, fencing and railings, fixtures and hardware, pool, outlets, stairs, masonry, chimney and overall cleanliness of the

jobsite. (Cl. Ex. 7, pp. 48-50.) The Respondent failed to remedy any of the issues and responded with additional questions rather than stating when and how the work would be accomplished.

12. The Respondent provided his own punch list acknowledging the large number of items needing to be completed but did not provide any information as to how or if he planned to remedy the issues. (Cl. Ex. 8, pp. 52-53.)

13. On August 16, 2018, the Claimant terminated the Contract with the Respondent.

14. On August 22, 2018, the Claimant met with a new contractor, Hyo Lee, trading as Millennium Homes, Inc. (Millennium), to discuss completion of the home project.

15. At the time the Contract was terminated, the Respondent left the Claimant's project in disarray, with incomplete, inadequate, and unworkmanlike construction, requiring Millennium and other licensed contractors to repair and replace many items to complete the work, including:

- The electrical outlets and wiring were not done correctly and were not connected to the electric panel, so the outlets and panels needed to be replaced.
- The plumbing of the new water line and sewer line were not completed by the Respondent and were completed by Roman Plumbing. The Respondent failed to cap the water main so there was no shut-off. When the water line was corrected and connected by the new contractor, there were leaks throughout the new construction and the renovations, causing additional damage and requiring replacement or remediation.
- None of the three bathrooms that the Respondent remodeled were complete or done according to the specifications; all were missing fixtures. The bathrooms were subsequently completed.
- The external doors were hung backwards and had to be rehung.
- Many of the upgraded fixtures that the Complainant had purchased and provided to the Respondent for incorporation in the renovations, such as door hardware and ADA-compliant bathroom fixtures, were lost or taken by the Respondent and had to be repurchased by the Complainant and installed.

- The Respondent installed a sump pump in the basement that was not connected to a drain, causing damage to the new renovation and requiring that the floor be jack-hammered and a drain installed.
- The Respondent had improperly installed the furnace and the hot water heater, causing water damage and mold in the basement and overflow of the sump pump because it had no drain. The basement had to be re-drywalled to repair the damage and the furnace and hot water heater had to be re-installed.
- The Claimant paid for the range hood; all the parts were there when it arrived at the home. The Respondent lost or took some of the parts, which the Claimant had to pay to reorder in order to have it installed.
- The Respondent did not complete the kitchen backsplash; the Claimant had to pay a new contractor to complete the installation.
- The Respondent improperly poured the pool foundation and improperly set the pool piping, causing both to be jackhammered out and redone.
- The Respondent failed to put drains in the window wells as required, requiring the removal of the flagstone that had been laid and the installation of drainpipes.
- The Respondent installed the hard wood floors before the HVAC system had been installed and the electric connected, which caused severe cupping of the floors. All the floors had to be removed and reinstalled.
- The Contract called for the Respondent to raise the chimney, which he did not do. The Claimant paid a new contractor to make the chimney repairs.
- The Respondent did not install the railing as stated in the Contract and did not complete the porch, which other contractors had to complete.

16. There were numerous items throughout the Contract where the Claimant paid for an upgrade from builder's grade items or supplied particular items herself. The Respondent failed to utilize the items as stated in the Contract and instead used a lesser HVAC system than required, and lost items such as a mantel, range hood parts, bathroom fixtures, and lighting installations.

17. The Claimant did not have Millennium complete the work to the heightened requirements as set forth in the Contract because she could not afford the level of finishes for

which she had already paid the Respondent. Millennium and the other licensed contractors fixed the Respondent's unworkmanlike and unfinished items to the level where they would pass the building code requirements.

18. The Claimant paid Millennium \$92,007.28 to repair and complete portions of the Respondent's incomplete, inadequate and unworkmanlike project and to oversee completion of the Contract to code standards. (Cl. Ex. 23.)

19. The Claimant individually purchased items and paid other licensed Millennium subcontractors \$56,410.45 to complete and repair specific portions of the Respondent's incomplete, inadequate and unworkmanlike project. (Cl. Ex. 23.)

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[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)⁴; *see also* COMAR 09.08.03.03B(2) ("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."

⁴ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

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. The Contract called for extensive renovations and an extension and pool on the Claimant's property with a total Contract price of \$613,580.42 after change orders were added. Although the Claimant's claim form to the Fund indicates that the Claimant paid the Respondent \$518,500.00, the actual cancelled checks provided by the Claimant at the hearing total \$550,285.07 of payments to the Respondent.⁵ (Cl. Ex. 39). The Respondent performed unworkmanlike, inadequate, and incomplete home improvements in virtually every aspect of the Contract. The plumbing and electrical were done improperly and incompletely, with outlets and wiring needing to be replaced and walls having to be reopened because of leaks once the exterior water main, was replaced and tested by a subsequent contractor. The entire pool had to be jackhammered out and re-poured because the Respondent set the concrete and piping improperly. The Respondent dropped the basement sump pump into a hole without installing drainage and when the improperly installed water heater and furnace leaked, water built up in the basement causing the new drywall to mold, requiring replacement of walls and more jackhammering to add the necessary drainage pipe. The Claimant produced photographs that were taken the day she terminated the Contract that, as the saying goes, were worth a thousand words. (CL. Exs. 12, 13.) Shoddy and incomplete construction is evident throughout the project: outlets falling out of walls, a hose into the unconnected sump pump reservoir, water

⁵ It appears that the Claimant's calculation was based on the original contract price and the remaining unpaid draw of \$57,900.00. The Claimant demonstrated she paid many additional invoices to the Respondent for change orders in addition to the initial draw schedule.

marks in the newly finished basement, fixtures missing from the bathrooms and kitchen, cupping hardwood floors. Nothing was complete and the entire property was a mess inside and out.

The Claimant testified that she acquired the property in May 1998 as her principle residence. She did some minor repairs over the years, then in 2016 hired an architect to develop a major remodel. She entered a contract with the Respondent on June 2, 2017 with a specific scope of work, six to eight-month timeline, and payment schedule. The Claimant testified she paid every payment on the schedule. She stated that the Respondent did not perform per the Contract; he started late, did not finish, kept losing or damaging owner-provided items, used subpar items instead of the finishes required in the Contract, and performed unworkmanlike work that was not up to code per the County inspectors. She testified that she followed the AIA requirements in giving the Respondent due process and the opportunity to remedy before she terminated the Contract.

The Claimant paid for an independent inspection by Claxton Associates to memorialize a visual inspection of what was incomplete or done incorrectly. (Cl. Ex. 14.) She then hired Millennium to complete the project to the point where it would pass inspection, at a cost of \$151,000. She testified however, that the cost to her was "immeasurable" because in addition to paying Millennium she had to pay attorneys fees to deal with mechanic liens of subcontractors. The Claimant has continuing problems with items such as: the HVAC which was smaller and cheaper than what was required in the Contract, she paid for solid wood doors and the Respondent installed hollow doors, she paid for a cedar porch and the Respondent installed pine, she paid for low voltage lighting and the Respondent installed standard. She did not replace these items because of the costs involved. She paid others to repair and complete the

Respondent's work, but only to the extent that it would pass inspection, and not with the high-end finishes provided in the Contract.

The Claimant testified that there were change orders and an amendment to the Contract. In the February 16, 2018 amendment (Clmt. Ex. 4), the parties agreed to a liquidated damages clause for delays if the project was not completed by June 4, 2018. As the spring changed to summer, it became clear that the project would not be complete, and the Respondent refused to answer the Claimant's calls. The Claimant testified that subcontractors started asking her for payment and gave the example of an insulation contractor who said he had not been paid, when his insulation project was included in a draw that she had paid the Respondent. She also testified about specialty items she purchased herself for the project, such as ADA-compliant smoke detectors and bathroom fixtures and the mantel, that disappeared from the project and were not installed by the Respondent. She testified that although some items were substantially completed, such as the pool, basement sump pump, plumbing and electric, they needed to be redone because the Respondent had done them incorrectly and not to code. The Contract called for the replacement of the water and sewer lines which were paid for, but not done. The Claimant testified that she had no choice but to terminate the Contract because it was clear the Respondent could not do the job.

The Claimant provided many photographs (Clmt. Exs. 11-13) to show the condition of her home at the time of the termination in August 2018. The Claimant described in detail all the things that were missing, done improperly, or were incomplete, and the photographs painted a clear picture of the terrible condition of her home left by the Respondent.

The Claimant presented the testimony of two expert witnesses, Seth Ballard, AIA of Ballard + Mensua Architects, who was accepted as an expert in architecture and home remodel,

and Hyo Lee, General Contractor and Principal of Millennium Homes, who was accepted as an expert in the field of general contracting.

Mr. Ballard was the architect who designed the project and worked directly with the Claimant and helped her obtain the Respondent as the general contractor. Mr. Ballard noticed very early on in the project that the Respondent seemed to be spreading himself thin among his existing projects and did not have enough manpower assigned to the Claimant's project. He had to follow up with the Respondent and made many punch lists along the way. The parties even tried to break up the project into smaller projects to try to get some things completed, but it did not work. He testified that the Respondent was given every opportunity to fix the unworkmanlike issues and complete the project, but the Respondent failed to do so, causing them to terminate the Contract. Mr. Ballard testified that the Claimant had paid for materials that never made it to the jobsite or were there one day and gone the next. He stated that it became clear that the Respondent had underpaid or not paid his subcontractors when they stopped showing up. Some subcontractors appeared at the Claimant's home and demanded direct payment from her.

On or about August 14, 2018, the Claimant and Mr. Ballard requested that the Respondent do a walk-through of the project, but the Respondent sent two new project managers instead who were not familiar with the project. The Claimant and Mr. Ballard created a punch list, as did the Respondent. (Clmt. Exs. 7, 8.) Mr. Ballard testified that the Respondent's punch list implied "substantial completion" when that was far from the reality. He also testified that the Respondent had been overpaid considering what remained to be completed.

Mr. Ballard testified that the Respondent's email of July 31, 2018 (Clmt. Ex. 35) was the last straw because the Respondent was requesting additional payment to complete the items for

which the Respondent had already been paid. He testified that the Respondent provided a "very inaccurate" picture of the status of the project. Mr. Ballard testified that despite having been paid most of the Contract funds, 25% of the job was still deficient, and the Respondent was overpaid by \$50,000.

After giving notice to the Respondent that they were terminating the Contract, Mr. Ballard reached out to Hyo Lee at Millennium Homes, Inc. to develop a fixed price contract for each part of the project that needed to be reworked or completed. Mr. Ballard testified that Millennium completed the Respondent's Contract and did not go beyond the original Contract requirements.

Hyo Lee of Millennium Homes, Inc. was accepted as an expert in the field of general contracting. Mr. Lee testified that he was introduced to the Claimant by Mr. Ballard to complete her home renovation project. Mr. Lee testified that the project was "not in good shape" when he first got there and acknowledged that Claimant Exhibit 11 was a fair representation of the Claimant's property when he began. He provided the Claimant with a proposal (Clmt. Ex. 15) and acknowledged that he had no idea at that point what was going on behind the walls. They agreed to a time and materials proposal. He testified that he did have to open walls to fix the plumbing and electric and that his job was to correct and complete the substandard work performed by the Respondent so it could pass inspection.

Mr. Lee gave examples of the Respondent's substandard work, citing: the installation of the hardwood floors without the HVAC so they buckled, the closing of the drywall without testing the pipes which leaked when the water was turned back on causing plumbing and drywall repairs, and the unfinished electrical panel with outlets not hooked to the panel. He stated the

job left by the Respondent "was a mess" and was "deficient and in need of replacement and repair."

Mr. Lee testified that the Claimant paid all his invoices for a total of \$151,678.62 for his work and that of his subcontractors who were involved with the renovations. He stated that the Claimant paid some of his subcontractors directly.

Having clearly demonstrated that the Respondent provided unworkmanlike and incomplete home improvements at the Claimant's home, I find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is 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). The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed some work under the Contract, and the Claimant retained other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

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).

These are the calculations related to the Claimant's case:

Original Contract Price	\$576,400.00
Change Orders	+ \$ 37,180.42
Total Contract Price	\$613,580.42
Amount Paid to Respondent	\$550,287.07
Amount Paid to Others to Repair	+ \$148,417.73
Total Payments	\$698,704.80
Total Payments	\$698,704.80
Total Contract Price	- \$613,580.42
ACTUAL LOSS	\$ 85,124.38

Although I find that the Claimant has suffered losses in excess of \$85,000.00, 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 \$85,124.38 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 Claimant has 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)(c). I further conclude that the Claimant is entitled to recover \$20,000.00 from the Fund. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

RECOMMENDED ORDER

I **RECOMMEND** 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 ten percent (10%) as set by the Maryland Home Improvement Commission;⁶ and

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

October 6, 2020
Date Decision Issued

CONFIDENTIAL

Willis Gunther Baker
Administrative Law Judge

WGB/ej
#186728

⁶ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 13th day of November, 2020, 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.

Lauren Lake

Lauren Lake

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***