

IN THE MATTER OF THE CLAIM	* BEFORE A. J. NOVOTNY, JR,
OF MARSHA FRENCH &	* AN ADMINISTRATIVE LAW JUDGE
MICHAEL BAKALYAR,	* OF THE MARYLAND OFFICE
CLAIMANTS,	* OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	* OAH NO.: DLR-HIC-02-13-08863
IMPROVEMENT GUARANTY FUND	* MHIC NO.: 10 (90) 1102
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF VASILIOS POLYZOS,	*
T/A POLYZOS PAINTING, INC.,	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On February 8, 2011, Marsha French and Michael Bakalyar (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$5,499.84 for actual losses allegedly suffered as a result of a home improvement contract they entered with Vasilios Polyzos, t/a Polyzos Painting, Inc., (Respondent). On April 12, 2012, they amended that claim to \$2,800.00.

After investigation, on January 30, 2013, the MHIC issued a Hearing Order and forwarded the case to the Office of Administrative Hearings (OAH). On July 24, 2013, I held a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312 and 8-407 (2010 & Supp. 2013). The Claimants appeared and represented themselves. The Respondent appeared and represented himself. The Fund was represented by Peter Martin, Assistant Attorney General.

The contested case provisions of the Administrative Procedure Act, the MHIC's procedural regulations, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03.01; 09.08.02.01; and 28.02.01.01.

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 the following exhibits on the Fund's behalf:

Fund 1 - Notice of Hearing, dated March 20, 2013, with certified mail receipt

Fund 2 - Respondent's licensing information, dated June 25, 2013

Fund 3 - Letter dated February 24, 2011 from the MHIC to the Respondent, along with a copy of the claim form

Fund 4 - Letter dated April 19, 2012 from the MHIC to the Respondent, along with a copy of an amended claim form

Fund 5 - Letter dated July 18, 2012 from the MHIC to the Respondent, along with a copy of a Proposed Order

Fund 6 - Letter dated July 25, 2012 from the Respondent to the MHIC

Fund 7 - Letter dated October 19, 2012 from the MHIC to the Claimants, advising of the referral to the OAH

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

Cl. 1 - Contract between the Claimants and the Respondent, dated February 26, 2009

Cl. 2 - MHIC Complaint Form, signed August 23, 2011, along with photographs numbered one to fourteen

Cl. 3 - Copy of check number 7352, dated July 21, 2009

Cl. 4 - Letter from the Respondent to the MHIC

Cl. 5 - Catons Plumbing and Service work orders, dated June 17 and June 18, 2009

Cl. 6 - Claimants' diagram of the cold water plumbing system

Cl. 7 - Proposal from Perau Associates, Inc. (Perau), dated July 9, 2010

Cl. 8 - Michael's Floor Service (Michael's) receipt, dated September 16, 2009

Cl. 9 - Claimants' handwritten cost/construction tally sheet

Cl. 10 - Packet of receipts from Home Depot, Duron Paints & Wall Coverings, and Kendall's Hardware, from July 27, 2009 through October 10, 2009

Cl. 11 - Envelope of peeled plaster pieces

Cl. 12 - Letter from MHIC to Claimant, dated January 25, 2013

The Respondent offered no documents into evidence.

Testimony

The Claimants testified on their own behalf and called Pete Kosterick, owner of Perau, as a witness.

The Respondent testified on his own behalf and called Juan Reyes, his employee, as a witness.

The Fund called the Claimant, Mr. Bakalyar, as a rebuttal witness.

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. He is licensed under License No. 01-17750. (Fund 2).
2. On or about February 26, 2009, the Claimants and the Respondent entered into a home improvement contract wherein the Respondent was to: install interior drywall and perform plastering; remove wall paper; repair damaged holes and cracks; install base boards and paint with two coats of Duron Paint latex flat for doors and trim, semi-gloss for the walls in the living room, kitchen, hallway, laundry and furnace rooms at the Claimants' house at 5919 Gales lane, Columbia, Maryland 21045. (Cl. 1).
3. The agreed upon price was \$2,800.00. The Claimants paid the Respondent an initial payment of \$1,000.00 on July 21, 2009. (Cl. 1 & 2).
4. Work began on or about July 20, 2009 and stopped July 27, 2009. (Fund 3).
5. In the time between the contract and the beginning of the work, the Claimants had plumbing repairs made in the ceiling by Catons Plumbing Company. The plumbing work was completed on June 18, 2009. (Cl. 5).
6. The Claimants were dissatisfied with the quality of the Respondent's work as it progressed. The paint did not match; there were color variations and drips in the paint. Cracks were appearing in the plaster.
7. The Claimants and the Respondent did not agree on repairs to the project, but agreed that the Claimants would pay the Respondent an additional \$500.00 for the work he had done.

They agreed to end the contract and that the Respondent would not do the baseboard work.

8. Thereafter, the plaster cracked and peeled significantly. Large pieces of plaster dropped from the ceilings and walls. (Cl. 2, photographs; Cl. 11).
9. The Claimants made the repairs to the cracked, peeling walls and ceilings themselves.
10. The Claimants spent \$491.20 at Home Depot and Kendall's Hardware to purchase materials and Duron Paints in order to repair the cracked, peeling walls and ceilings. (Cl. 10.).
11. The Claimants suffered an actual, compensable loss of \$491.20 due to the Respondent's incomplete, inadequate or unworkmanlike home improvements.

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. 2013). *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). In order to be compensated by the Fund, the Claimant bears the burden of proving by a preponderance of the evidence that he or she suffered an actual loss incurred as a result of misconduct by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 201) and § 8-407(e) (2010); COMAR 09.08.03.03.

There is no dispute that the Respondent was a licensed home improvement contractor at the time that he entered into the contract with the Claimant. (Fund 2). There is no dispute that the work done by the Respondent resulted in mismatched paint, color variations, drips, and cracks, along with peeling plaster. (Cl. 2).

The Maryland Court of Appeals has defined “workmanlike manner” as that term applies to building and construction contracts. In *Gaybis v. Palm*, 201 Md. 78, 85 (1952), the Court held, “[t]he obligation to perform work with skill and care is implied by law and need not be stated in [any] contract.” In *K & G Construction Co. v. Harris*, 223 Md. 305, 314 (1960), the Court compared the express standard “workmanlike manner” with the implied standard of performance discussed in the *Gaybis* case. The *K & G* Court cited the *Gaybis* case for authority that the “workmanlike-manner” wording was equivalent to the “skill-and-care” wording. The rule in the *Gaybis* case was reaffirmed in *Worthington Construction Corp. v. Moore*, 266 Md. 19, 22 (1972).

Additionally, in B.A. Garner, *A Dictionary of Modern Legal Usage*, 582 (1987), “workmanlike” is defined as “Characteristic of or resembling a good workman: businesslike.” “Workmanlike” is also defined as “Typical of or befitting a skilled workman or craftsman.” *Webster’s II New Riverside University Dictionary* 1328 (1994). Most recently *Merriam-Webster’s Collegiate Dictionary* 1443 (11th ed. 2006), defines workmanlike as “Characterized by the skill and efficiency typical of a good workman.” Therefore, in the context of this case, unworkmanlike means that the particular home improvement work has not been done with the requisite skill and care typical of a good workman.

There was no expert testimony. Even without an expert, the photographs quite clearly show evidence of unworkmanlike home improvements: the paint did not match and large sections of plaster were peeling. The Respondent argued, in essence, that the Claimants assumed the risks of a poor, unworkmanlike result because he had warned them that there was a pipe leak in a wall. When they insisted that the work begin despite the warning, the Respondent was faced with the choice of either proceeding with a project in which, according to his worker’s testimony, he

clearly anticipated problems, or declining to proceed and angering his customer. Even if I believed the Respondent's position, which I do not, I conclude that the responsibility for any water damaged plaster would have been with the Respondent, because, as the licensed, experienced professional, he allegedly proceeded with the work while actually knowing that there was a pipe leak behind a wall.

However, the Respondent's position is totally without credibility. The Claimants conceded that, at the time, the pipe in question may have been wet, as the Respondent's worker stated. However, the Claimants credibly testified that since the cold water pipe was exposed (part of the wall had been removed after the plumbing work had been done), the wetness was surface condensation, and not a leak. That is a reasonable position: it was summer, July, and the pipe was a cold water pipe. Moreover, even if there were a leak at that spot behind a wall, water damage from that spot would not have extended throughout the house, causing damage in all of the rooms and ceilings serviced by the Respondent. Lastly, there was no evidence of water damage, such as staining, soft spots or puddles anywhere. (Cl. 2, photographs).

The Fund did not dispute that the Respondent performed unworkmanlike construction. However, the Fund did dispute the claim of actual losses. Although the Claimants presented the Perau proposal (CL. 7), it addressed work to be done in rooms and areas not mentioned in the original proposal, and it was not itemized as to individual costs. Additionally, the Perau proposal seemed unreasonably high compared to the original contract.¹ Moreover, the Claimants did not proceed on the Perau proposal. Instead, the Claimants did the work themselves. Although the Claimants presented their labor cost claim (CL. 9) and the Michael's Flooring bill (CL.8),

¹ The original contract which included the baseboards was \$2,800.00. The Perau proposal, which did not include the baseboards and which addressed rooms and areas not mentioned in the original proposal, was \$6,930.00. There was no explanation of the differences in costs.

Michaels was the Claimants' own home improvement company. Additionally, although the Claimants presented the Michael's Flooring bill, the original contract was modified to delete that baseboard work. Therefore, the Claimants are not entitled to recover the cost of doing the baseboards. Finally, calculations of awards from the Fund do not provide for Claimants to be paid for their own labor. COMAR 09.08.03.03B.

Thus the Fund argued that the most that the Claimants were entitled to receive from the Fund was the cost of the materials used to repair the Respondent's unworkmanlike home improvement. Mr. Martin and the Claimants laboriously went over all of the Claimants' receipts in order to ascertain the costs of materials, paint, brushes, and such, used by the Claimants to repair the Respondent's unworkmanlike home improvement. (Cl. 10). The receipts/costs totaled \$491.20.

For the reasons that follow, I accept the Fund's position that \$491.20 as a reasonable actual loss determination of reimbursable costs to remedy the Respondent's unworkmanlike home improvement.

COMAR 09.08.03.03B governs the calculation of awards from the Fund.

MHIC's regulations offer three formulas for measurement of a claimant's actual loss:

B. Measure of Awards from Guaranty Fund.

(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. (Emphasis added)

COMAR 09.08.03.03B(3).

Although the Claimants have met their burden to show that the Respondent's work was unworkmanlike, the determination of actual loss is not so easily determined. COMAR 09.08.03.03B(b)(3)(a) is inapplicable because the Respondent did not abandon the contract without doing any work. Furthermore, because no one addressed the point, expert or otherwise, I have no basis to fairly value the work that the Respondent properly performed, if any, which would be necessary to calculate the Claimants' actual loss under COMAR 09.08.03.03B(b)(3)(b).

Clearly, not everything that the Respondent did had to be replaced or repaired. At least some sections of sheetrock or plaster were salvageable, and thus had some value, even if it had to be repainted or plastered. The Respondent removed wallpaper, which has some value. Even the Perau proposal primarily referred to stripping, priming, patching and repainting rather than replacing anything. Indeed, the Claimants never represented that *everything* that the Respondent did had to be removed and replaced.

Additionally, I cannot use COMAR 09.08.03.03B(b)(3)(c) to calculate the Claimants' actual losses because they failed to establish to a reasonable degree of certainty any reasonable

amounts that they paid or would be required to pay another contractor to repair and complete the work. They did the work themselves and the Perau proposal was not an adequate estimate.

However, COMAR 09.08.03.03B(b)(3) specifically allows me to apply a unique measurement if required by a particular claim. In this instance, I conclude that I have no other choice but to do so. Therefore, I find that the Fund's recommendation is appropriate in this case.

Based upon the materials that they needed to repair or replace the Respondent's unworkmanlike home improvements, I conclude that the Claimant's actual loss in this matter is \$491.20. 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 Claimants to the Respondent. Md. Code Ann., Bus. Reg. §8-405 (e)(1) and (5) (Supp. 2013). The Claimants paid \$1,500.00 to the Respondent, and their actual loss, which is \$491.20, is less than the \$20,000.00 maximum payable from the Fund, as well as being less than what they paid to the Respondent. Hence, the Claimants are entitled to reimbursement from the Fund in the amount of \$491.20.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimants have established that they sustained an actual loss under Section 8-401 of the Business Regulation Article as a result of the Respondent's work being unworkmanlike and in violation of section 8-311(a)(10). Md. Code Ann., Bus. Reg. § 8-311(a)(10) (2010). Therefore, the Claimants are entitled to be compensated from the Fund for the acts or omissions of the Respondent in the amount of \$491.20. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(e)(5) (2010 & Supp. 2013); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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


ORDER that the Claimants be awarded \$491.20 from the Maryland Home Improvement Guaranty Fund;

ORDER that the Respondent be 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 (10%) as set by the 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

October 11, 2013
Date Decision Mailed

A. J. Novotny, Jr. 
Administrative Law Judge

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