

IN THE MATTER OF THE CLAIM	* BEFORE BRIAN ZLOTNICK,
OF SATISH BHANDARI,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF JOSE MOLINA	*
CACERES, T/A POLAKO	*
CONSTRUCTION, LLC,	* OAH No.: DLR-HIC-02-15-26033
RESPONDENT	* MHIC No.: 15 (90) 618

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On June 15, 2015, Satish K. Bhandari (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$14,031.00 in alleged actual losses suffered as a result of a home improvement contract with Jose Molina Caceres, trading as Polako Construction, LLC (Respondent).

I held a hearing on May 5, 2016 at the Largo Government Center in Largo, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant and the Respondent represented themselves. Chris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

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 (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent?
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:

Claim. Ex. 1 - Contract, dated October 31, 2104

Claim. Ex. 2 - Copies of checks made out to the Respondent from the Claimant, dated October 31, 2014, November 4, 2014, November 8, 2014 and November 8, 2014

Claim. Ex. 3 - Invoice from Sita Tile in the amount of \$1,637.06, dated October 16, 2014

Claim. Ex. 4 - Invoice from Sita Tile in the amount of \$164.89, dated October 20, 2014

Claim. Ex. 5 - Home Depot receipt in the amount of \$694.10, dated October 31, 2014

Claim. Ex. 6 - Photograph of kitchen tile, taken in November 2014

¹ Unless otherwise noted, all citations to the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

Claim. Ex. 7 - Photograph of kitchen tile, taken in November 2014

Claim. Ex. 8 - Photograph of kitchen tile, taken in November 2014

Claim. Ex. 9 - Photograph of kitchen tile taken in November 2014

Claim. Ex. 10 - Proposal from Dove Remodeling Services, dated February 25, 2015

The Respondent did not submit any exhibits into evidence.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notice of Hearing, dated March 8, 2016

Fund Ex. 2 - Hearing Order, dated July 29, 2015

Fund Ex. 3 - Respondent's license history, printed May 4, 2016

Fund Ex. 4 - Home Improvement Claim Form, dated February 25, 2015, with attached complaint from the Claimant, dated February 24, 2015

Fund Ex. 5 - Letter from MHIC to the Respondent, dated June 15, 2015

Testimony

The Claimant testified on his own behalf and did not present any witnesses.

The Respondent testified and did not present any other witnesses.

The Fund did not call any witnesses.

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 4745178. The current license is set to expire on November 27, 2016.

2. On October 31, 2014, the Claimant and the Respondent entered into a contract to renovate the Claimant's kitchen at his primary residence in Glen Dale, Maryland (Contract).

3. The Contract specified the replacement of an existing kitchen vinyl floor with porcelain tiles. The price of the Contract consisted of labor costs and the cost of materials that the Claimant would purchase for the Contract on behalf of the Respondent.

4. On October 16, 2014, the Claimant purchased porcelain tiles for the Contract from Sita Tile Distributors in the amount of \$1,637.00. (Claim Ex. #3).

5. On October 30, 2014, the Claimant purchased additional materials for the Contract from Sita Tile Distributors in the amount of \$164.89. (Claim Ex. #4).

6. On October 30, 2014, the Claimant purchased additional materials for the Contract from The Home Depot in the amount of \$694.10 (Claim Ex. #5).

7. The Claimant paid a total of \$2,495.99 for Contract materials.

8. On October 31, 2014, the Respondent began work on the Contract.

9. The Claimant paid the Respondent the following checks for his labor costs:

- October 31, 2014 - \$763.00
- November 4, 2014 - \$915.90
- November 8, 2014 - \$800.00
- November 8, 2014 - \$241.41

Total labor costs paid by Claimant to Respondent - \$2,720.31 (Claim. Ex. #2).

10. The total Contract price paid by the Claimant for labor and materials was \$5,216.30.

11. Prior to the completion of the Contract, the Claimant noticed that the tiles were uneven. The Respondent assured the Claimant that the tiles would be even when the job was finished.

12. Prior to the completion of the Contract, the Claimant informed the Respondent that some of the installed tiles had chipped corners. The Respondent replaced one tile but did not replace the remaining tiles.

13. The Respondent completed the Contract on November 7, 2014.
14. The kitchen floor installed by the Respondent contained chipped corners, uneven grout and uneven tiles that were raised from the floor surface. Approximately twenty to thirty% of the tiles were chipped and thirty to forty% of the tiles were raised above the surface of other tiles. (Claim Ex. #s 6, 7 & 8).
15. On November 8, 2014, the Respondent returned to the Claimant's home to receive his final payment. The Claimant told the Respondent that he was not satisfied with the Respondent's work. The Respondent told the Claimant that he could not make any repairs on November 8, 2014. The Claimant's wife informed the Respondent that she was going out of town and wanted to be present when the Respondent returned to make repairs so the Claimant told the Respondent that he would call him when his wife returned home.
16. On November 20, 2014, the Claimant contacted the MHIC to inquire about filing a complaint against the Respondent. The MHIC asked the Claimant to contact the Respondent. The Claimant left a voicemail message with the Respondent asking him to call the Claimant but the Respondent did not reply.
17. The Claimant received a proposal from Dove Remodeling Services (Dove) on February 25, 2015 to fix the Respondent's work. Dove indicated that it would have to remove all of the tiles installed by the Respondent. Dove also indicated that it would remove all of the kitchen cabinets, shoe molding and countertops prior to installation of new tile and then it would reinstall the kitchen cabinets, shoe molding and countertops after installation. Dove's estimate included labor and materials and totaled \$14,031.00. The Claimant did not contract with Dove to complete the Contract. (Claim Ex. #10).

18. The Respondent improperly installed the kitchen tiles which resulted in chipped and uneven tiles. (Respondent's testimony).

19. There is no value in the work performed by the Respondent on the Contract.

20. The Claimant has not had any repairs or restoration work performed by another contractor on the Contract.

21. The Claimant is not: a spouse or other immediate relative of the Respondent; an employee, officer, or partner of the Respondent; or an immediate relative of an employee, officer, or partner of the Respondent.

22. The Claimant owns one residence in Maryland.

23. The Claimant has not taken any legal action to recover monies from the Respondent other than the instant claim.

DISCUSSION

An owner bears the burden of proof, by a preponderance of the evidence, with respect to a claim against the Fund. Md. Code Ann., Bus. Reg. § 8-407(e); COMAR 09.08.03.03A(3); Md. Code Ann., State Gov't § 10-217 (2014). 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); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for 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. However, 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), and may not compensate a claimant for more than paid to the original

contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(5). Further, a claimant may not recover from the Fund if he or she has unreasonably rejected good faith efforts on the part of a respondent to resolve the matter. *Id.* at § 8-405(d).

In addition, an owner must prove that at all relevant times: (a) the owner owned fewer than three dwelling places or resides in the home as to which the claim is made; (b) the owner was not an employee, officer or partner of the contractor or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the owner did not unreasonably reject the contractor's good faith effort to resolve the claim; (e) any remedial work was done by licensed contractors; (f) the owner complied with any contractual arbitration clause before seeking compensation from the Fund; (g) there is no pending claim for the same loss in any court of competent jurisdiction and the owner did not recover for the actual loss from any source; and (h) the owner filed the claim with the MHIC within three years of the date the owner knew or with reasonable diligence should have known of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g); 8-408(b)(1) and (2).

There is no dispute that the Respondent was a licensed home improvement contractor, and that the Respondent entered into a home improvement contract with the Claimant for the renovation of the Claimant's kitchen floor in his primary residence in Maryland. In addition, the preponderance of the evidence shows that the Claimant owns fewer than three dwelling places, and, that the Claimant is neither an employee, officer or partner (past or present) of the Respondent, nor an immediate relative of the Respondent, his spouse or any of his partners, officers or employees. The evidence also shows that the Claimant did not recover for the Respondent's acts or omissions from any other source, and there are no actions or claims

pending in any court of competent jurisdiction or with any other source of recovery. Finally, it is undisputed that there is not an arbitration clause in the Contract and that the Claimant filed his claim within three years of the date of the Contract.

The parties do not dispute that the Respondent completed the work under Contract. It is also undisputed that the Respondent's work, as completed, was inadequate or unworkmanlike as the Respondent admitted during cross examination that the raised, uneven and chipped floor tiles that he installed for the Claimant was the result of faulty workmanship by him. He also admitted that the caulking work he performed was not done properly. Furthermore, the photographs produced by the Claimant established the Respondent's inadequate performance of the Contract by visually demonstrating the uneven, raised and chipped tiles installed by the Respondent.

The Respondent's sole defense was that he wanted to repair his damaged work. However, I found the Claimant's testimony to be credible that when he confronted the Respondent about his poor work on November 8, 2014, the Respondent informed him that he could not make any repairs that day. The Claimant then told the Respondent that his wife was going out of town and that he would call him when she returned as she wanted to be present when the Respondent returned to make repairs. The Respondent admitted during cross examination that he received a call from the Claimant in late November 2014 but that he did not return his call. The Respondent never responded to the Claimant's call to schedule any repairs to the Contract. Accordingly, I find that the Claimant has not unreasonably rejected good faith efforts on the part of the Respondent to resolve the matter.

Proposed Award

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 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.

COMAR 09.08.03.03B(3)(b).

The Claimant's actual loss is calculated after considering that he contracted with the Respondent for a total amount of \$5,216.30 for labor and materials purchased by the Claimant on behalf of the Respondent. The Claimant also established, through the Dove proposal, that the work performed by Respondent had no value as all of the tiles installed by the Respondent would have to be removed in order to allow another contractor to perform the Contract.

The award from the fund is, therefore, computed as follows:

Amount paid to the Respondent	\$5,216.30
Minus value of materials or services provided by the Respondent	\$0.00
Award amount	\$5,216.30

Based on the above considerations, the Claimant is entitled to a reimbursement from the Fund in the amount of \$5,216.30. Md. Code Ann., Bus Reg. §8-405 (e)(1). Even if a different award formula was considered, it is worth noting that 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. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5). The Claimant paid

\$5,216.30 to the Respondent², thus his award is limited to a maximum amount of \$5,216.30.

Accordingly, the appropriate award is \$5,216.30.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss in the amount of \$5,216.30 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a) (2015). I further conclude that the Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the Claim. Md. Code Ann., Bus. Reg. § 8-405(d) (2015). I finally conclude that the Claimant's recovery is limited to the \$5,216.30 he paid the Respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(5) (2015).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$5,216.30; 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 (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

July 19, 2016
Date Decision Issued

Brian Zlotnick
Administrative Law Judge

BMZ/cj
#163436

² Of this amount, \$2,720.31 was for labor cost paid to the Respondent and \$2,495.99 in materials cost paid by the Claimant on behalf of the Respondent for the performance of the Contract.

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

PROPOSED ORDER

WHEREFORE, this 19th day of August, 2016, 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.

J. Jean White

***I. Jean White
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION

