

IN THE MATTER OF THE CLAIM * BEFORE KERWIN A. MILLER, SR.,
 OF CARL HUNT AND JANICE HUNT, * AN ADMINISTRATIVE LAW JUDGE
 CLAIMANTS * OF THE MARYLAND OFFICE
 AGAINST THE MARYLAND HOME * OF ADMINISTRATIVE HEARINGS
 IMPROVEMENT GUARANTY FUND *
 FOR THE ALLEGED ACTS OR *
 OMISSIONS OF BERTRAM LEBHAR, *
 IV, T/A THE ATLANTIC * OAH No.: DLR-HIC-02-16-16843
 REMODELING CORPORATION, * MHIC No.: 16 (05) 662
 RESPONDENT *

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On March 2, 2016, Carl Hunt and Janice Hunt¹ (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$8,907.00 in alleged actual losses suffered as a result of a home improvement contract with Bertram Lebharr, IV, trading as The Atlantic Remodeling Corporation (Respondent).

I held a hearing on November 21, 2016 at the Office of Administrative Hearings, 11101 Gilroy Road, Hunt Valley, Maryland 21030. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e)

¹ Janice Hunt made an oral motion to be attached as a party to the case without objection from the Fund. Having found that Mrs. Hunt is an owner of the property in question and there would be no prejudice to the Respondent, I granted her motion to be attached as a party to this case.

(2015).² The Claimants represented themselves. Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting fifteen minutes for the Respondent or someone to represent him to appear, I proceeded with the hearing in his absence. I determined that the notice provided to the Respondent was proper.³ Md. Code Ann., Bus. Reg. §§ 8-312(h), 8-407(a) (2015); Code of Maryland Regulations (COMAR) 28.02.01.23A.

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 govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimants 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 Claimants' behalf:

- Clmts. Ex. 1 - Home Improvement Contract, dated May 9, 2015
- Clmts. Ex. 2 - Check #5404, dated May 9, 2015
- Clmts. Ex. 3 - Cancellation Letter, dated May 12, 2015
- Clmts. Ex. 4 - Letter to Claimant from Respondent, dated May 12, 2015
- Clmts. Ex. 5 - Complaint Form, dated November 4, 2015

No exhibits were offered on the Respondent's behalf.

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

³ Notices of the hearing (Notices) were mailed to the Respondent at his address of record by certified and regular, first class mail on July 27, 2016. COMAR 09.08.03.03A(2). The July 27, 2016 Notices were returned as undeliverable. A second Notice was sent to the Respondent's last known home address listed with the State Department of Assessment and Taxation by both certified and regular, first class mail on September 20, 2016. COMAR 09.08.03.03A(2). The September 20, 2016 Notices were not returned as undeliverable.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Notice of Hearing, dated September 20, 2016
- Fund Ex. 2 - Real Property search, dated September 19, 2016
- Fund Ex. 3 - Email to Sandra L. Sykes from Eric London, dated September 19, 2016
- Fund Ex. 4 - Hearing Order, dated May 18, 2016
- Fund Ex. 5 - Respondent's Licensing History, dated August 30, 2016
- Fund Ex. 6 - Home Improvement Claim Form, dated March 2, 2016
- Fund Ex. 7 - MHIC Letter to the Respondent, dated March 16, 2016

Testimony

The Claimants testified on their behalf and did not present any additional witnesses.

Neither the Respondent nor the Fund presented 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 numbers 01-66422 and 05-120999.

2. On May 9, 2015, the Claimants and the Respondent entered into a contract to perform the following work at the Claimants' home located at 611 Sungold Road, Reisterstown, MD 21136:

- Tear off existing 1 layer(s) of shingles
- Install Certain Teed Diamond Deck Synthetic underlayment
- Install F4.5 Drip Edge on complete perimeter of the roof
- Install CertainTeed WinterGuard on all Gutter lines, valleys and protrusions
- Install shingles – CertainTeed Architectural Color: Colonial Slate
- Install/do not Install Shingled Ridge vent.
- Reflash all necessary areas
- Removal of all job debris
- 50 year manufacturer's warranty
- 50 year labor warranty

3. The contract approximate start and completion dates were May 23, 2015 and June 6, 2015 respectively.

4. The contract provided that the Claimants could cancel the contract by a signed and dated written notice or telegram no later than midnight of May 13, 2015. The contract required that the written notice be mailed or delivered to 8019 Corporate Dr., Suite H, Baltimore, MD 21236.

5. The original agreed-upon contract price was \$26,721.00.

6. On May 9, 2015, the Claimants paid the Respondent \$8,907.00 as a deposit on the contract.

7. On May 13, 2015, Mr. Hunt, on behalf of the Claimants, hand delivered a cancellation letter to the Respondent at his office located at 8019 Corporate Dr., Suite H, Baltimore, MD 21236. The cancellation letter was delivered at 12:00 noon on May 13, 2015.

8. Mr. Hunt delivered the cancellation letter to the Respondent's General Manager, Jim Yates.

9. When Mr. Hunt asked Mr. Yates for the return of his \$8,907.00 deposit, Mr. Yates told him that he (Mr. Yates) needed to talk to the Respondent first.

10. The Claimants made numerous calls to the Respondent from June, 2015 – October, 2015 requesting the return of their \$8,907.00 deposit. Each time the Claimants called, they were told that only the owner could authorize the return of a down payment and that the owner was not in.

11. On the final call the Claimants made to the Respondent, they were told by someone, other than the Respondent, that there would be no return of their \$8,907.00 deposit, because the Claimants breached the May 9, 2015 home improvement contract.

12. The Claimants never had any contact with the Respondent.

13. The Claimants never heard from the Respondent's company after they were told that they were in breach of the May 9, 2015 home improvement contract.

14. The Respondent never performed any work on the May 9, 2015 home improvement contract.

15. On March 2, 2016, the Claimants filed a Claim with the MHIC, requesting reimbursement of \$8,907.00 from the Fund.

DISCUSSION

In this case, the Claimants have the burden of proving the validity of their Claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).⁴ “[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); *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 Claimants have proven eligibility for compensation.

Without dispute, the Claimants and the Respondent entered into a home improvement contract on May 9, 2015 to perform work on the Claimants' home located at 611 Sungold Road, Reisterstown, MD 21136. It is uncontested that the total contract price on the home improvement contract was \$26,721.00 and that, on May 9, 2015, the Claimants paid the Respondent an \$8,907.00 deposit on the contract. Additionally, it is unchallenged that the

⁴ As noted above, “COMAR” refers to the Code of Maryland Regulations.

Claimants, pursuant to a cancellation provision in the contract, timely cancelled the contract by delivering written notice of cancellation to the Respondent's office at 12:00 noon on May 13, 2015. Finally, it is also unchallenged that although the Respondent did not perform any work on the contract, he refused to return the Claimants' \$8,907.00 deposit. Accordingly, I am satisfied that the Claimants established a compensable actual loss because of the Respondent's omission or, in this case, refusal to refund the Claimants' \$8,907.00 deposit after the Claimants' timely cancellation of the May 9, 2015 home improvement contract. Md. Code Ann., Bus. Reg. § 8-405(a). *See also* COMAR 09.08.03.03B(2). I thus find that the Claimants are eligible for compensation from the Fund.

I now turn to the amount of the award, if any. Unless a particular claim requires a unique measurement, the MHIC shall determine a claimant's actual loss using one of the formulas found in COMAR 09.08.03.03B(3) which provides:

(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.

In this case, COMAR 09.08.03.03B(3)(a) is not totally applicable because the Claimants timely cancelled the home improvement contract before the Respondent had an opportunity to abandon it. COMAR 09.08.03.03B(3)(b) is not applicable because the Respondent did not perform any work under the contract. Likewise, COMAR 09.08.03.03B(3)(c) is also inapplicable because the Respondent did not perform any work under the contract.

The Fund suggested that the evidence presented by the Claimants established an actual loss as a result of the Respondent's acts or omissions as a home improvement contractor which may justify a unique measurement of actual loss as provided by COMAR 09.08.03.03B(3). In this case, the Claimants entered into a home improvement contract with the Respondent on May 9, 2015 and paid an \$8,907.00 deposit on the contract the same day. The contract provided that the Claimants could cancel the contract prior to midnight on May 13, 2015. The Claimants timely canceled the contract at noon on May 13, 2015, and the Respondent refused to refund the Claimants' \$8,907.00 deposit. Accordingly, the Fund argues that the \$8,907.00 deposit is the Claimants' actual loss and should constitute the amount awarded from the Fund. I agree with the Fund and recommend that the Fund award the Claimants for an actual loss sustained in the amount of \$8,907.00.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of \$8,907.00 as a result of the Respondent's acts and omissions. 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 award the Claimants \$8,907.00; 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 at least ten percent (10%) as set by the Maryland Home Improvement Commission;⁵ and

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

Signature on File

February 17, 2017
Date Decision Issued

Kerwin A. Miller, Sr.
Administrative Law Judge

2/16)

KAM/dlm
#166775

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 10th day of April, 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.

Bruce Quackenbush

***Bruce Quackenbush
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION