

IN THE MATTER OF THE CLAIM OF	* BEFORE BRIAN ZLOTNICK,
BRIAN P. WELLS	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	* OAH No.: DLR-HIC-02-14-28977
OMISSIONS OF GENE MAZZATENTA,	* MHIC No.: 14 (75) 193
t/a MAZZATENTA CONSTRUCTION	*
CO., INC.	

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On June 1, 2014, Brian P. Wells (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$19,833.59 for actual losses allegedly suffered as a result of home improvement work performed by Gene Mazzatenta, t/a Mazzatenta Construction Co., Inc. (Respondent).

I held a hearing on April 24, 2015 at the Talbot County Public Library, 100 W. Dover Street, Easton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) (2015).¹ Peter Martin, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant was present and was represented by Russell C. Dashiell, Jr.,

¹ All citations to the Business Regulation Article (Bus. Reg.) are to the 2015 volume.

Esquire. Despite proper notice,² the Respondent failed to appear, so I heard the case in his absence. *See* Business Regulation Article § 8-312(h); Code of Maryland Regulations (COMAR) 09.01.02.09.

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.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 - MHIC Claim Form, dated May 20, 2014
- Clmt. Ex. 2 - Printout from Maryland Department of Assessments and Taxation, generated on January 22, 2015
- Clmt. Ex. 3 - Letter from MHIC to the Respondent, dated June 24, 2014
- Clmt. Ex. 4 - Contract, dated October 15, 2012
- Clmt. Ex. 5 - Photographs of the property that the Respondent took prior to December 2012 (before construction commenced)
- Clmt. Ex. 6 - Chronology of work performed by the Respondent
- Clmt. Ex. 7 - Photographs of Respondent's work on the contract

² As was detailed on the record at the hearing, certified and regular U.S. mail was sent to the Respondent at the address the MHIC found for him: his address of record with the MHIC and his address of record with the Maryland Motor Vehicle Administration (120790 Kibler Road, Greensboro, Maryland). The hearing was originally scheduled for January 26, 2015, but when that notice was returned to OAH with a forwarding address of 6 Willow Grove Mill Drive, Middletown, Delaware, the hearing was rescheduled for April 24, 2015 and notice was mailed to the Respondent at his Middletown, Delaware address.

- Clmt. Ex. 8 - Invoices and cancelled checks with the Respondent, various dates
- Clmt. Ex. 9 - Invoices and cancelled checks with Gardner Construction
- Clmt. Ex. 10 - Letter from Richard Newton, postmarked April 22, 2014
- Clmt. Ex. 11 - Curriculum Vitae of Ronald H. Hamblin
- Clmt. Ex. 12 - Ronald Hamblin's Inspection Report, dated January 23, 2015
- Clmt. Ex. 13 - OAH decision, dated January 20, 2015
- Clmt. Ex. 14 - Respondent's contract, timesheets and billing information, various dates
- Clmt. Ex. 15 - Gardner Construction Invoices, various dates

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

- GF Ex. 1 - Notice of Hearing and Hearing Order with attached returned certified mail envelope, dated November 14, 2014
- GF Ex. 2 - Notice of Hearing, dated February 6, 2015, with attached returned certified and regular mail envelopes
- GF Ex. 3 - Notice of Hearing, dated February 23, 2015
- GF Ex. 4 - Letter from Peter Martin, Assistant Attorney General, to the Respondent, dated April 8, 2015, with attached Hearing Order, Notice of Hearing and returned envelope
- GF Ex. 5 - Letter from David R. Finneran, dated April 10, 2015, with Respondent's licensing history
- GF Ex. 6 - Affidavit of William Banks, Jr., dated April 13, 2015
- GF Ex. 7 - Letter from MHIC to Respondent, dated June 24, 2014, with attached Home Improvement Claim Form

No exhibits were submitted on the Respondent's behalf.

Testimony

The Claimant and his wife, Julianne F. Wells, testified. Andrejus Skutovas, Subcontractor for Gardner Construction, testified on behalf of the Claimant. The Claimant also presented the testimony of Ronald H. Hamblin, Home Inspector, who was accepted as an expert

in home construction, cost estimation, home inspection and remedial construction and cost analysis for residential construction. The Fund did not present any witnesses.

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 0143418. The MHIC issued the Respondent his license on May 19, 1992 and it remained in effect until November 7, 2014.
2. The Claimant's primary residence was in Pennsylvania. The Claimant hired the Respondent to perform work on their home in Oxford, Maryland. The Claimant does not own more than three residences.
3. On October 15, 2012, the Claimant and the Respondent entered into a contract to build a bedroom addition to the Claimant's Oxford home. The contract also specified the addition of a screened-in porch.
4. The original agreed upon contract price was \$28,529.00. An additional payment of \$2,579.10 was added to the contract to pay for the relocation of a water line resulting in a total contract price of \$31,108.10.
5. On October 15, 2012, the Claimant paid the Respondent a deposit in the amount of \$7,000.00 to allow the Respondent to purchase materials to begin work on the contract.
6. From November 5, 2012 to December 27, 2012, the Respondent prepared for the project by completing necessary drawings and attending historic board meetings.
7. The Respondent began work on the contract in late December 2012 by removing the existing rear deck and digging a trench for the bedroom addition.

8. The Respondent began working on the porch addition on January 9, 2013 by removing existing plants and bricks and digging porch footers. The Respondent finished pouring the porch footers on January 29, 2013 and installed the porch posts and beams on February 5, 2013. By March 19, 2013, the Respondent installed floor joists and floorboards on the porch. On April 11, 2013, the Respondent completed the screen panels, pickets, soffit, fascia boards, roof plywood and paper.

9. From April 12, 2013 to July 13, 2013, the Respondent installed twenty linear feet of Azek trim and installed the screen door for the porch. Rough electric work was also completed for the porch by an electrical subcontractor during this time frame.

10. Work on the bedroom addition was significantly delayed due to the Respondent's difficulty in pouring a foundation for the bedroom addition. The Respondent initially planned to complete a monolithic foundation but was unable to implement this foundation due to ground water issues. The Respondent ultimately switched to a traditional footer and block foundation which his workers began by pouring the bedroom footers on May 17, 2013.

11. Julianne F. Wells, Claimant's wife, was in contact with the Respondent on a near daily basis. The Respondent would often tell Ms. Wells that it was raining on certain days but Ms. Wells contacted her Oxford neighbors who informed her that the weather was fine on those days when the Respondent indicated inclement weather.

12. In April 2013, the Claimant emailed the Respondent expressing his concern over the lack of progress in completing the contract. The Respondent responded that the contract should be completed by the end of May 2013. The Respondent also indicated in a separate May 2013 email that his original estimate for the cost of the contract is close to the actual cost.

13. The Respondent finished the bedroom foundation on June 23, 2013 and poured the slab on June 26, 2013. By July 5, 2013, the Respondent completed the bedroom framing walls and roof.

14. The Respondent charged the Claimant for the hours of manpower that he committed to completing the contract. By July 15, 2013, the Respondent had submitted invoices totaling \$49,992.01 for work performed on the contract. The Respondent completed 50% of the contract by July 15, 2013.

15. The Claimant paid the Respondent a total of \$32,331.37.

16. On July 13, 2013, the Claimant terminated the contract with the Respondent due to the slow pace of the work and the escalating cost to complete the contract.

17. There were numerous defects in the work performed by the Respondent, including the following:

- Bedroom walls were not plumb
- Bedroom rafters were not square
- Insufficient nails in bedroom sheathing
- Three foot section of bedroom wall required a variance because it did not line up correctly with the opening of the existing bathroom in the main residence
- The use of incorrect fasteners on Azek porch trim

18. On or about July 16, 2013, the Claimant hired Gardner Construction (Gardner) to complete the Respondent's contract. Gardner's work on the bedroom addition was delayed by four weeks because it had to apply for a variance with the Oxford zoning board due to the Respondent's error in its construction of the bedroom frame.

19. Gardner assigned a subcontractor, Adrejus Skutovas (Skutovas), a Maryland licensed home improvement contractor, to execute the contract with the Claimant. Skutovas completed the work on the contract by himself in October 2013. Skutovas indicated that he

could have completed the original contract between the Claimant and the Respondent from start to finish in approximately three months.

20. The Claimant paid Gardner \$18,610.32 to correct and complete work performed by the Respondent within the scope of the original contract between the Claimant and Respondent.

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) (2015). *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 (2015). For the following reasons, I find that the Claimant has suffered an actual loss and is eligible for compensation from the Fund.

First, the Respondent was a licensed home improvement contractor at the time he and the Claimant entered into the contract.

Second, the Respondent performed an unworkmanlike, inadequate and incomplete home improvement. The Claimant persuasively testified that the Respondent’s work in constructing the bedroom walls and rafters were done incorrectly or in an unworkmanlike manner. Further, the Claimant demonstrated through pictures that the Respondent constructed the bedroom addition beyond the existing home’s bathroom entrance thus resulting in the need for Gardner to obtain a variance from the Oxford zoning board in order to complete the contract.

At the time the Claimant terminated the contract, there was no question that the project was only 50% complete. Ronald H. Hamblin (Hamblin), accepted as an expert in home construction, cost estimation, home inspection, remedial construction and cost analysis for residential construction, reviewed the Respondent’s invoices, photographs of the Respondent’s

work and inspected the job site and found that at the time the contract was terminated in July 2013, the work was only 50% complete and there were a number of corrections to the Respondent's work that were necessary. Hamblin further indicated that the scope of the Respondent's contract should have been completed in no more than three months and that the Respondent had taken an excessive amount of time to only complete half of the job. Hamblin further testified that he spoke with Gardner and reviewed its invoices for its work to complete the contract and found that the amount of the Claimant's fund claim is fair and reasonable.

Additionally, the Respondent's delay in finishing the project could not be attributable to poor weather as there were numerous instances in which the Respondent made those claims to Ms. Wells only to have such claims refuted when Ms. Wells contacted her Oxford neighbors who indicated that the weather conditions were fine. Further, the Claimant's Oxford neighbor, Mr. Newton, indicated in his written statement that on a particular day he walked by the job site at various times and noticed the Respondent's workers lounging on furniture at the Claimant's home. Clearly, the delayed pace of the Respondent's work cannot be attributed to the weather but instead was the result of the Respondent's inaction. Furthermore, as the Respondent charged the Claimant for each hour of manpower he used, the costs of the contract had escalated from its original price to nearly \$50,000.00 by July 2013 with only half of the project completed. As this project should have been completed in three months, it's clear that the Respondent was slowing the pace of his work in order to increase the amount of money he could obtain from the Claimant. Therefore, the Claimant properly terminated the Respondent's contract for undue delays in its completion.

Having found eligibility for compensation, I now turn to the amount of the award, if any. A claimant may not be compensated for consequential or punitive damages, personal injury,

attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). Unless a claim requires a unique measurement, actual loss is measured by one of the three following formulas:

(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.

COMAR 09.08.03.03B(3).

As the Respondent did work according to the contract and the Claimant has solicited another contractor to complete the contract, the formula found in COMAR 09.08.03.03B(3)(c) is appropriate. Using this formula, the computation is as follows:

Amount paid to the Respondent:	\$ 32,331.37
<i>Plus</i> amount payable to repair and complete:	<u>\$ 18,610.32</u>
Total:	\$ 50,941.69
<i>Minus</i> original contract price	<u>\$ 31,108.10</u>
Actual Loss:	\$ 19,833.59

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$19,833.59 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$19,833.59; 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. Md. Code Ann., Bus. Reg. § 8-411(a) (2015); and

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

Signature on File

July 14, 2015
Date Decision Mailed

Brian Zlotnick
Administrative Law Judge

BMZ/emh
#157097

PROPOSED ORDER

WHEREFORE, this 14th day of August, 2015, 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.

Andrew Snyder

***Andrew Snyder
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION