

IN THE MATTER OF THE CLAIM	* BEFORE KERWIN A. MILLER, SR.,
OF LOIS GALLION,	* 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 MICHAEL GILBERT,	*
T/A THE RESIDENTIAL	* OAH No.: DLR-HIC-02-15-31376
MAINTENANCE & REMODELING	* MHIC No.: 15 (90) 793
CO.,	
RESPONDENT	

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On March 23, 2016, Lois Gallion (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$3,175.00 in alleged actual losses suffered as a result of a home improvement contract with Michael Gilbert, trading as The Residential Maintenance & Remodeling Co. (Respondent).

I held a hearing on February 23, 2016 at the Office of Administrative Hearings, 11101 Gilroy Road, Hunt Valley, Maryland 21031 (OAH). Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant represented herself. The Respondent represented himself. John D. Hart, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the MHIC procedural 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), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01B, 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 of 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:

- Clmt. Ex. A - Contract between the Claimant and the Respondent, dated September 9, 2013
- Clmt. Ex. B - Letter from Joe Gilbert to the Claimant, dated September 9, 2013
- Clmt. Ex. C - G.H. Clark estimate for replacement sink, dated March 19, 2015
- Clmt. Ex. C1 - G.H. Clark letter on behalf of the Claimant, dated September 16, 2015
- Clmt. Ex. D - R. Solomon Construction Co. proposal for replacement flooring and sink, dated March 21, 2015
- Clmt. Ex. E - Letter from R. Solomon Construction Co. to the Claimant, dated September 19, 2015
- Clmt. Ex. F - Letter from the Respondent (undated) to the Claimant with various Home Depot receipts attached
- Clmt. Ex. G - Invoice #13237 from Builders Surplus Center, Inc., dated December 10, 2013

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

- Clmt. Ex. H - Photos of damage to floor (undated)
- Clmt. Ex. I - Photos of damage to sink (undated)
- Clmt. Ex. J - Photo of sink (undated)
- Clmt. Ex. K - Photo of sink (undated)
- Clmt. Ex. L - Photo of sink (undated)
- Clmt. Ex. M - Photo of sink (undated)
- Clmt. Ex. N - Photo of sink (undated)
- Clmt. Ex. O - Floor sample
- Clmt. Ex. P - Granite Sample
- Clmt. Ex. Q - Specifications for Hayside Bamboo flooring
- Clmt. Ex. R - Specifications for Glenwood Oak flooring
- Clmt. Ex. S - Home Improvement Claim form, dated March 23, 2015
- Clmt. Ex. T - Flash drive with voicemail recording
- Clmt. Ex. U - Letter from the Claimant to the Respondent, dated September 12, 2013
- Clmt. Ex. V - Copies of checks issued by Claimant dated September, 16, 2013; October 26, 2013, and December 16, 2013

The Respondent did not offer any exhibits.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Notice of Hearing, dated February 22, 2016
- Fund Ex. 2 - Hearing Order, dated September 10, 2015
- Fund Ex. 3 - The Respondent's licensing history, dated February 22, 2016
- Fund Ex. 4 - Home Improvement Claim form, dated March 23, 2015
- Fund Ex. 5 - MHIC letter to the Respondent, dated March 31, 2016

Testimony

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

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

The Fund did not present 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 01-43561.
2. The Respondent's son Joe Gilbert was the Foreman for the Respondent's remodeling company.

3. The Claimant initially met Joe Gilbert at her home, located at 6 Juliet Lane, Unit #303, Baltimore, Maryland 21236. The Respondent's company was recommended to the Claimant to remodel her kitchen.

4. After the Claimant's initial meeting with Joe Gilbert, they met again at Home Depot² to identify and price materials to be used for the kitchen remodeling job at her home.

5. During the Home Depot meeting, the Claimant identified the specific laminate flooring with a fifty-year warranty she wanted installed in her kitchen, as well as the Fiorito granite she wanted the Respondent to use for her countertop install.

6. The Claimant provided Joe Gilbert with samples of the laminate flooring and Fiorito granite she had chosen.

7. On September 16, 2013, the Claimant and the Respondent entered into a contract for the remodeling of her kitchen. The proposal included:

...a twelve inch pantry, approximately seven wall cabinets, and approximately four base cabinets (wall cabinets were to be thirty six inches in height with brushed nickel hardware), twenty square feet of granite countertop with a standard backsplash, a standard new thirty inch stainless steel sink³, a Moen faucet (Banbury), brushed nickel in style matching cabinets hardware, and approximately 200 square feet of pergo laminate flooring with underlayment.

8. The flooring was to be sealed in wet zones and have new one quarter round trim installed as new transitions. Additionally, all debris and waste were to be removed on a daily basis.

9. The schedule was to be prepared approximately two weeks after one-third of the contract price was paid to the Respondent.

² The specific Home Depot was not identified by either party.

³ The contract did not specify whether or not the sink was supposed to be an undermount or overmount sink.

10. Work on the project began on or about October 5, 2013, and finished on or about December 2, 2013.

11. The original agreed-upon contract price was \$5,785.00. The contract price was increased to \$6,185.00 when the Claimant agreed to pay the Respondent an additional \$400.00 specifically for "Fiorito" granite to be used for the countertop.

12. The Claimant paid the Respondent the following amounts, totaling \$6,185.00:

- \$1,928.00 on September 16, 2013
- \$1,928.00 on October 26, 2013
- \$2,328.00 on December 16, 2013

13. The flooring the Respondent installed in the Claimant's kitchen was not the flooring the Claimant chose during her meeting at Home Depot with Joe Gilbert. The flooring installed by the Respondent carried a fifteen-year warranty.

14. The flooring installed by the Respondent was damaged in several areas.

15. The Respondent had a used sink installed in the Claimant's kitchen. Within two days of installation, scratches were visible all over the sink.

16. The Respondent was not present when the sink was installed in the Claimant's kitchen.

17. The sink installed in the Claimant's kitchen was an overmount sink. The Claimant never informed the Respondent that she wanted an undermount sink installed in her kitchen.

18. On March 19, 2015, the Claimant received an estimate from G.H. Clark for a replacement of the sink. The estimate was \$425.00.

19. On March 21, 2015 the Claimant received an estimate from R. Solomon Construction Co. for replacement of the flooring and the sink. The estimate for the flooring was \$2,750.00. The estimate for the sink was \$2,450.00.⁴

20. On March 23, 2015, the Claimant filed a claim with the MHIC, requesting reimbursement of \$3,175.00 from the Fund.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. 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 (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.” 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 Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor, MHIC license number 01-43561, at the time he entered into the contract with the Claimant. There are no *prima facie* statutory impediments barring the Claimant from recovering compensation from the Fund (such

⁴ The estimate included replacement of the granite countertop with new Fiorito granite C Class with an undermount stainless steel sink and new Kohler faucet.

as being related to the Respondent, recovering from the Respondent in a court proceeding, owning more than three residential properties, etc.). Md. Code Ann., Bus. Reg. §§ 8-405(f)(1) and (2) (2015).

The Claimant and the Respondent entered into a home improvement contract on September 16, 2013 to remodel the kitchen of her residential home in Baltimore, Maryland. The original contract price was \$5,785.00. The Respondent began performing the contract on or about October 5, 2013. While performing the contract, the Claimant and the Respondent agreed to use Fiorito granite for her countertop for an additional cost of \$400.00. This additional cost increased the total contract price to \$6,185.00. The Respondent completed the work on or about December 2, 2013. The Claimant paid the Respondent a total of \$6,185.00.

The Claimant argued that the Respondent performed inadequate home improvement at her home with respect to three aspects of the contract. She claimed the Respondent installed the wrong laminate flooring in her kitchen; the Respondent installed a used sink in her kitchen;⁵ and the Respondent charged her an additional \$400.00 for a Fiorito granite countertop which should have been included in the original contract price of \$5,785.00. The Respondent argued that he performed adequate home improvement on the Claimant's kitchen. He further argued that the flooring he used in the kitchen was per the contract; the sink was new; and the additional \$400.00 for the Fiorito granite countertop was agreed to by the Claimant.

I find that the Respondent satisfactorily performed a portion of the work at the Claimant's home. However, for the reasons set forth below, I find that some of the work the Respondent performed at the Claimant's home was inadequate home improvement. I thus find that the

⁵ The Claimant also argued that she wanted an undermount and not an overmount sink. However, she conceded that she never informed the Respondent of her preference for an undermount sink, nor was an undermount sink required by the contract.

Claimant is eligible for compensation from the Fund. For purposes of my discussion, I have outlined below the three areas in which the Claimant alleged inadequate home improvements.

The Kitchen Flooring

The Claimant testified that prior to entering into the home improvement contract with the Respondent, she met with his son Joe Gilbert at a Home Depot to pick out and price material to be used to perform the contract. She further testified that she chose a laminate flooring with a fifty-year warranty and provided Joe Gilbert with a sample of the flooring. When Joe Gilbert began installing the flooring in her kitchen, she noticed that it was not the same flooring she had chosen when they met at Home Depot. She testified that she advised him the flooring he was installing was not what she had chosen and he just looked up at her and then continued installing the flooring. At that time, the Claimant went back to Home Depot to inquire about the flooring that Joe Gilbert was installing in her kitchen and was informed by the Home Depot staff that it came with a fifteen-year warranty and was inferior to the flooring she had originally chosen. The Respondent argued that the contract only required "pergo laminate flooring" and did not require any other specifications, namely a specific warranty.

I find the Claimant's testimony that she provided Joe Gilbert a sample of the flooring that she wanted installed in her kitchen to be credible. The Claimant was detailed and specific with her recollection of her conversation with Joe Gilbert at Home Depot when they were choosing and pricing material for her kitchen remodeling project. She recalled that Joe Gilbert had his child with him at the time and that they would provide the child with different items to keep her occupied while they looked at materials for the project. Additionally, because the Respondent was neither present during the conversation between the Claimant and Joe Gilbert at Home Depot, nor during the installation of the flooring, the Claimant's testimony was not rebutted or

discredited. Finally, the Claimant's testimony was consistent with a letter from Joe Gilbert in which he states:

... We were able to match all of your choices very closely. We are confident that you will be pleased with our choices/matches. We would like to remind you that you are just as evolved (sic) with every aspect of this project as we...

(Claimant Ex. B)

I further find based on the Claimant's testimony and review of the Claimant's photos, that the flooring installed by the Respondent has bubbled up, chipped and separated at various different sections.

Therefore, I find the Claimant contracted with the Respondent for laminate flooring with a fifty-year warranty and received inferior laminate flooring with a fifteen-year warranty.

The Sink

There is no dispute that the home improvement contract between the Claimant and the Respondent did not require the installation of an undermount sink. There is also no dispute that the Claimant contracted with the Respondent for a new thirty-inch stainless steel sink. The Claimant testified that within two days after the installation of the sink, she noticed that the sink contained significant scratches and appeared to be used. She testified that it took her two days to notice the condition of the sink because she has poor lighting in her kitchen. The Respondent testified the sink that was installed in the Claimant's kitchen was a new sink. The Respondent originally testified that he was present when the sink was installed. In fact, the Respondent was adamant that he was present when the sink was installed and that it was new and "right out of the box." It was not until a November 27, 2013 text about the sink install was read by the Claimant into the record that the Respondent changed his testimony and admitted that he was not present during the sink install. Additionally, when asked by the Claimant to provide a receipt for the

sink that was installed in her kitchen, the Respondent was unable to provide said receipt. I find the Claimant's testimony credible that the sink installed in her kitchen by the Respondent was a used sink. Her recollection of who was and was not present during the install was accurate and was not disputed by any other credible evidence.

I further find that based on the Claimant's testimony and review of Claimant's Exhibits I-N, the sink installed in the Claimant's kitchen was scratched, worn and used.

Therefore, I find that the Claimant contracted with the Respondent for a new thirty-inch stainless steel sink and received a used thirty-inch stainless steel sink.

The Granite Countertop

The Claimant testified that prior to entering into the contract with the Respondent, she provided Joe Gilbert with a sample of the Fiorito granite that she wanted for her kitchen countertop. She further testified that the sample was provided to Joe Gilbert when they met prior to the Claimant entering into the contract with the Respondent. The Respondent was not present during that meeting and was unable to rebut her testimony on that issue. However, the evidence is unrefuted that the Claimant agreed to pay the Respondent an additional \$400.00 for the installation of the Fiorito granite countertop and in fact received the Fiorito granite countertop. Therefore, I find that the Respondent fulfilled his contractual obligation to install a Fiorito granite countertop in the Claimant's kitchen and the installation of the Fiorito granite countertop was not an inadequate home improvement.

Actual Loss

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 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).

The Claimant obtained an estimate from G.H. Clark, a licensed home improvement contractor, to replace the used sink with a new sink. The estimate for the work to be performed totals \$425.00 which is reasonable. The Claimant obtained an estimate from R. Solomon Construction Co., a licensed home improvement contractor, to replace the defective flooring with new laminate flooring with a fifty year warranty.⁶ The estimate of the work to be performed and the \$2,750.00 charge is reasonable. Neither of the above estimates includes any work beyond that necessary to replace the sink and flooring. The Claimant has not had the work done by either contractor.

Applying the formula, I calculate the Claimant's actual loss as follows:

Amount paid to Respondent under the contract	\$6,185.00
Amount the Claimant will pay to G.H. Clark	+ \$425.00
Amount the Claimant will pay to R. Solomon Construction Co.	+\$2,750.00
Original contract price (with verbal amendment)	<u>-\$6,185.00</u>
Claimant's actual loss	\$3,175.00

⁶ I do not find the Solomon estimate for the sink replacement reasonable because it includes work that was not bargained for in the contract between the Claimant and Respondent, such as the undermount sink.

I propose that the Fund award the Claimant \$3,175.00, representing her actual loss as a result of the Respondent's inadequate work on the kitchen flooring and the sink.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$3,175.00 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 Claimant \$3,175.00; 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;⁷ and

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

May 25, 2016
Date Decision Issued


Signature on File

Kerwin A. Miller, Sr.
Administrative Law Judge

KAM/kc
#162456

⁷ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 29th day of June, 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