

IN THE MATTER OF THE CLAIM
OF ROBERT RATCLIFFE,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF THOMAS CHAIKIN,
T/A HAMMER AND NAIL
EXTERIORS, INC.,
RESPONDENT

* BEFORE TARA K. LEHNER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-17-08831
* MHIC No.: 16 (05) 1411

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PROPOSED DECISION

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STATEMENT OF THE CASE

On February 1, 2017, Robert Ratcliffe (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$13,000.00 in alleged actual losses suffered as a result of a home improvement contract with Thomas Chaikin, trading as Hammer and Nail Exteriors, Inc. (Respondent).

I held a hearing on June 22, 2017 at the Office of Administrative Hearings (OAH), 10400 Connecticut Avenue, Suite 208, Kensington, Maryland 20895 (Kensington Office). Md. Code

Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant appeared and represented himself. The Respondent did not appear for the hearing. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Fund did not send a party representative.

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 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01B, and 28.02.01.

ISSUES

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions, and if so, what amount may the Claimant receive from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 Undeliverable Certified Mail to Respondent, returned to OAH on May 16, 2017
- GF Ex. 2 Hearing Order, March 17, 2017
- GF Ex. 3 MHIC Licensing Record for Respondent, printed June 5, 2017
- GF Ex. 4 MHIC Claim Form, received February 1, 2017
- GF Ex. 5 Letter from the MHIC to the Respondent, February 9, 2017

¹ All citations to the Business Regulation Article are to the 2015 volume.

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

- CI Ex. 1 Product Only Agreement, May 1, 2015
- CI Ex. 2 Credit card statements, May 22, 2015 and June 22, 2015
- CI Ex. 3 Internet search screenshots, June 6 and 7, 2016
- CI Ex. 4 Claimant's written testimony, June 20, 2017
- CI Ex. 5 Home Improvement Sales and Installation Agreement, February 19, 2012;
Final Finish Checklist, April 2, 2012

No exhibits were offered by the Respondent.

Testimony

The Claimant testified and did not present any other witnesses.

The Respondent was not present to testify or present witnesses.

Michael Miller, Investigator, MHIC, testified on behalf of the Fund.

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, who traded as Hammer and Nail Exteriors, Inc., was a licensed home improvement contractor under MHIC license number 87374.
2. Respondent provided the MHIC with the address of 15732 Cherry Blossum [sic] Lane, North Potomac, Maryland 20878, as both his residential and business address.
3. On February 19, 2012, the Claimant and the Respondent entered into a contract for the sale and installation of Marvin windows. The Respondent completed the work to the satisfaction of the Claimant.
4. In early 2015, the Respondent contacted the Claimant and informed him that Marvin was discontinuing the style of window previously installed in the Claimant's home. The

Respondent urged the Claimant to purchase more windows for subsequent home improvements before the matching style was no longer available.

5. On May 1, 2015, the Claimant and the Respondent entered into a contract for the purchase of eight windows and three French doors to be manufactured by Marvin (Contract). The Contract price for the windows and doors was \$26,520.00. The Contract did not state that the Respondent would perform the installation and did not include a price for the installation of these windows and doors.

6. At the time the Claimant entered into the Contract with the Respondent, the Claimant had not finalized plans for the home improvement that would involve these windows and doors. The Claimant and the Respondent agreed the Respondent would hold the windows and doors for the Claimant until the Claimant was ready for them.

7. On May 1, 2015, the Claimant paid the Respondent \$13,000.00 as a deposit on the Contract.

8. On or about August 2015, a representative of the Respondent contacted the Claimant to see if he was ready for the windows and doors. The Claimant told the representative that he was not yet ready for them.

9. Throughout May and June 2016, the Claimant attempted to make contact with the Respondent to make arrangements for the final payment for and delivery of the windows and doors. The Claimant was unsuccessful.

10. The Respondent never provided the Claimant with the windows and/or doors or returned the \$13,000.00 deposit.

11. In May 2016, the Claimant purchased different windows and doors directly from a supplier for approximately \$26,000.00. The windows and doors were subsequently installed in June 2016 by the Claimant's general contractor, Dynamic Renovations, Inc.

12. On April 17, 2017, the OAH mailed a Notice of Hearing (Notice) by United States Postal Service (USPS) Certified Mail Return Receipt and by First Class Mail to the Respondent's address of record with the MHIC. This Notice advised the Respondent that a hearing was scheduled for June 22, 2017, at 10:00 a.m., at the OAH Kensington Office.

13. On May 16, 2017, the Certified Mail copy of the Notice to the Respondent was returned to the OAH by the USPS as "Unclaimed, etc." The First Class Mail copy of the Notice to the Respondent was not returned to the OAH by the USPS.

14. No party made a request to postpone the June 22, 2017 hearing.

DISCUSSION

The Respondent's failure to appear

As discussed in the Findings of Fact above, the OAH mailed the Notice regarding the date, time and location of this hearing to the Respondent to his MHIC address of record via both First Class and Certified Mail. The Certified Mail Notice was returned to the OAH by the USPS as unclaimed. The First Class Mail Notice was not returned.

Michael Miller, investigator for the Fund, testified that he spoke with the Respondent and his attorney, Barry Helfand, on June 15, 2017, and confirmed the Respondent was aware of the date, time and location of the hearing. Mr. Miller further testified that Mr. Helfand told him that he was going to advise the Respondent not to attend the hearing.

On June 22, 2017, at 10:00 a.m., I convened a hearing in this case at the OAH Kensington Office. By 10:15 a.m., neither the Respondent, nor anyone claiming to represent the Respondent, appeared for the hearing. The OAH did not receive any request for postponement of the hearing.

The Respondent was properly notified of the date, time and location of this hearing. The Notice was mailed two months before the scheduled hearing by both First Class and Certified Mail to the address the Respondent provided to the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d) (the hearing notice shall be sent at least ten days before the hearing by certified mail to the business address of the licensee on record with the MHIC); *see also id.* § 8-407(a). Despite proper notice being sent, the Respondent failed to appear for the hearing. As a result, I proceeded with the hearing in the Respondent's absence. COMAR 28.02.01.23A.

Merits of the Claim

In this case, the Claimant has the burden of proving the validity of his 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 (3d ed. 2000)). For the reasons that follow, I do not find that the Claimant has proven eligibility for compensation from the Fund.

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*." Md. Code Ann., Bus. Reg. § 8-401 (emphasis added). "Home improvement" is defined as "the addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building that is used or designed to be used as a dwelling." Md. Code Ann., Bus. Reg. § 8-

101(g)(1)(i) (Supp. 2016). Home improvement does not include the “sale of materials, if the seller does not arrange to perform or does not perform directly or indirectly any work in connection with the installation or application of the material.” Md. Code Ann., Bus. Reg. § 8-101(g)(3)(iv).

The Contract between the parties was for the purchase of windows and doors; it was not for a “home improvement” as defined by the Code. The Contract heading clearly states “PRODUCT ONLY AGREEMENT” (Cl Ex. 1) and, as testified to by the Claimant, the Contract price of \$26,520.00 was for the purchase of the doors and windows only. The Contract does not include a price quotation for or any language or terms regarding installation. Additionally, the Claimant testified that at the time he entered into this Contract, he was not sure who would install them, whether it would be the Respondent, his general contractor for the project, or some other third-party.

Further, the prior contract between the parties from 2012 was specifically titled “HOME IMPROVEMENT SALE AND INSTALLATION AGREEMENT,” and included terms for both the purchase of the windows and the installation of them. Cl. Ex. 5. This is clearly different and distinguishable from the Contract at issue in this case.

Mr. King pointed to the boilerplate language on the back of the Contract that states the “[c]ontractor shall perform all work in a professional manner and in keeping with industry standards” (*see* Cl. Ex. 1) and offered that I could consider that language when determining whether this Contract relates to a home improvement. The Claimant’s testimony, the title of the Contract, and the lack of any provision on the face of the Contract that discusses installation clearly demonstrate the parties intended for this to be a materials only contract, and the boilerplate on the back of the Contract, that ostensibly would be included in any contract with the Respondent, does not change the clear intent of the parties in this case.

Accordingly, because I conclude that the Contract in this case is for the sale of materials, and there is no provision in the Contract or other evidence that proves that the Respondent would perform any work in connection with the installation of the doors and windows, I conclude that the Contract is not for a home improvement, and thus, the Claimant is not entitled to recovery from the Fund. Md. Code Ann., Bus. Reg. § 8-101(g)(1)(i) and (g)(3)(iv), 8-401, 8-405(a).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-101, 8-401, 8-405(a) (2015 & Supp. 2016); COMAR 09.08.03.03B(2).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

Signature on File

July 27, 2017
Date Decision Issued

Tara K. Lehner
Administrative Law Judge

TKL/sw
168777

PROPOSED ORDER

WHEREFORE, this 21st day of August, 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.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION