

IN THE MATTER OF THE CLAIM	* BEFORE RICHARD O'CONNOR,
OF DOUGLAS SOLAK,	* ADMINISTRATIVE LAW JUDGE,
CLAIMANT,	* THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH No.: DLR-HIC-02-16-30506
FOR THE ALLEGED ACTS OR	* MHIC No.: 16 (75) 230
OMISSIONS OF ROBERT DIEHL,	*
T/A ACCENT BUILDERS,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On August 5, 2016, Douglas Solak (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$12,701.35 in alleged actual losses suffered as a result of a home improvement contract with Robert Diehl, trading as Accent Builders (Respondent).

I held a hearing on May 17, 2017, at the Washington County Office Building in Hagerstown, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant participated without representation. Hope Sachs, Assistant Attorney General, Department of

¹ Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume.

Labor, Licensing and Regulation (Department), represented the Fund. The Respondent did not appear for the hearing. After waiting more than thirty minutes for the Respondent or someone to represent him, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.²

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 (OAH) 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 Claimant 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 into evidence on the Claimant's behalf:

- Cl. Ex. 1. Contract, December 17, 2013.
- Cl. Ex. 2. Loan Estimate, December 11, 2013.
- Cl. Ex. 3. Proposal, December 2, 2013.
- Cl. Ex. 4. Diagrams, plans, list of materials, and aerial photographs, various dates in 2013.
- Cl. Ex. 5. City of Hagerstown Public Information Act Request, February 27, 2014; Mechanical Permit, February 21, 2014; Electrical Permit, February 25, 2014; Building Permit, February 27, 2014; Plumbing Permit, February 24, 2014.
- Cl. Ex. 6. Letter from Wells Fargo Home Mortgage to the Claimant, January 8, 2014; letter from the Claimant to the Respondent, July 2, 2014.

² The file includes a death certificate indicating that the Respondent died on September 26, 2016. The Office of Administrative Hearings (OAH) mailed a notice of hearing to the Respondent's estate at his address of record by certified mail on March 2, 2017. COMAR 09.08.03.03A(2). Patricia Diehl signed the receipt for certified mail.

- Cl. Ex. 7. Wells Fargo Home Mortgage Cost Breakdown Detail, January 6, 2014.
- Cl. Ex. 8. Agreement between the Claimant and the Respondent, November 1, 2014.
- Cl. Ex. 9. Nine photographs of the Respondent's work.
- Cl. Ex. 10. Estimate from J-M Hardscapes and Home Improvement, April 19, 2015; invoice from J-M Hardscapes and Home Improvement, May 20, 2015; invoice from Interstate Garage Doors, Inc., March 26, 2015; invoice from Andrew Day Electric, Inc., April 16, 2015; invoice from Wayne's Painting, January 6, 2015; invoice from Wayne's Painting, January 8, 2015.
- Cl. Ex. 11. Seven photographs of the Respondent's work on the basement window area.
- Cl. Ex. 12. Ten photographs of a basement window, including the original window, the Respondent's work, and the current condition.
- Cl. Ex. 13. Cheryl L. Eckard Fungal Analysis Invoice, July 28, 2016; MouldWorks report, August 3, 2016.
- Cl. Ex. 14. City of Hagerstown Building Code excerpts.
- Cl. Ex. 15. City of Hagerstown Building Code excerpts.
- Cl. Ex. 16. Hydrologic Soil Group aerial photograph and description, printed May 13, 2017.
- Cl. Ex. 17. Estimate from Servpro of Washington County, Inc., August 4, 2016.
- Cl. Ex. 18. Proposal from ValueDry, March 29, 2016.
- Cl. Ex. 19. Another estimate from Servpro of Washington County, Inc., August 4, 2016.
- Cl. Ex. 20. Eleven photographs of roofing and water leaks.
- Cl. Ex. 21. City of Hagerstown Building Code excerpts.
- Cl. Ex. 22. Estimate from Bonded Applicators of MD, Inc., May 19, 2015.
- Cl. Ex. 23. Statement from Antietam Plumbing, March 10, 2015.

I admitted the following exhibits into evidence on behalf of the Fund:

- Fund Ex. 1. Notice of Hearing, March 2, 2017; two receipts for certified mail; memorandum from the Department to the OAH, March 1, 2017; copy of a death certificate, September 30, 2016.
- Fund Ex. 2. Transmittal, September 27, 2016; Hearing Order, September 26, 2016; Home Improvement Claim Form, August 5, 2016.

Fund Ex. 3. The Respondent's licensing history with the MHIC, printed February 21, 2017.

Fund Ex. 4. Letter from the MHIC to the Respondent, August 11, 2016, with the Home Improvement Claim Form attached.

Testimony

The Claimant testified on his own behalf and presented the testimony of Kellyanne Solak, his wife. No other witnesses testified.

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 01-35318.

2. On December 17, 2013, the Claimant and the Respondent entered into a contract to renovate a house at 929 Frederick Street, Hagerstown, Maryland that the Claimant and his wife bought at foreclosure.

3. The Claimant obtained a Department of Housing and Urban Development (HUD) renovation loan from Wells Fargo Home Mortgage to finance the renovation.

4. The contract price was \$48,491.00.

5. The maximum loan amount was \$54,340.00 and included ten percent of the contract amount for contingencies and \$1,000.00 for inspections.

6. The loan specified that renovations must be complete by July 3, 2014. The Respondent agreed to this provision.

7. The contract stated that work would begin within thirty days after the renovation loan closed and would be completed sixty working days thereafter.

8. The contract included the following:

- A. Build a concrete walkway from the basement entry and a retaining wall to keep water out of the basement;
- B. Remove old roofing (including flashing) and install a new roof;

- C. Install new steps on the rear deck and replace existing porch with masonry steps and stoop;
- D. Install new replacement windows;
- E. Install a new exterior door and a garage door;
- F. Replace four interior doors;
- G. Construct a bedroom in the basement;
- H. Install new drywall;
- I. Paint all interior walls;
- J. Replace trim;
- K. Install a ceramic tile floor in a bathroom;
- L. Furnish and install bathroom fixtures;
- M. Install a new water heater;
- N. Furnish and install plumbing for a new bathroom in the basement;
- O. Upgrade electrical wiring to code standards and install a range receptacle;
- P. Install a new heating system;
- Q. Install insulation in the attic and walls;
- R. Install a bathroom vanity; and
- S. Refinish a bathtub and wall tiles.

9. The renovation loan closed on January 3, 2014.

10. The Respondent did not start getting the required permits until February 21, 2014 and did not start work on the project until late February 2014.

11. Wells Fargo Home Mortgage disbursed \$32,161.82 to the Respondent from the renovation loan, and retained \$3,314.65 due to the Respondent for work performed as a contingency against any defects in workmanship.

12. Wells Fargo Home Mortgage terminated the renovation loan on July 3, 2014 because the Respondent had not completed the work called for in the contract.

13. On July 2, 2014, the Claimant cancelled the contract because the Respondent had not finished the work and had not communicated a schedule for completion to the Claimant. At the time, the Respondent had not done any work under the contract for about sixty days.

14. Wells Fargo Home Mortgage paid the \$3,314.65 to the Respondent for work performed, bringing the total amount disbursed under the contract to \$35,476.47.

15. As of July 2, 2014, the Respondent had left items unfinished or had provided poor workmanship as follows:

- A. An exterior basement door was poorly installed and opened onto an unfinished trench where the concrete walkway should have been;
- B. The walkway and masonry retaining wall had not been built;
- C. The porch and steps had not been replaced;
- D. The garage door did not operate properly;
- E. The master bedroom and a closet were not painted;
- F. Electrical work was not completed;
- G. The basement stairs had no handrail;
- H. The bathroom was unfinished, and some backer board and tile was installed incorrectly;
- I. The Respondent installed a double-hung window in the basement utility room sideways – it was poorly installed, did not operate, and leaked;
- J. The Respondent built a window well for another window that did not have adequate drainage and had a large hole under the window that allowed water to enter the basement;
- K. Water entering the basement caused mold to grow there and damaged insulation, drywall, baseboards, and flooring to the point that they are not salvageable;
- L. The Respondent buried the dryer vent underground;
- M. The Respondent did not remove the old flashing from the roof as called for in the contract;
- N. Installing new shingles around the old flashing caused the roof to leak.

16. The Claimant paid \$500.00 to Antietam Plumbing, a subcontractor, that the Respondent owed under the contract.

17. The Claimant paid \$5,400.00 to J-M Hardscape and Home Improvement for the concrete work called for in the contract with the Respondent (walkway, retaining wall, and porch).

18. The Claimant paid \$100.00 to Interstate Garage Doors, Inc., to adjust and lubricate the garage door installed by the Respondent.

19. The Claimant paid \$2,239.31 to Andrew Day Electric, Inc., to complete the electrical work called for in the contract with the Respondent.

20. The Claimant paid \$950.00 to Wayne's Painting to complete the painting and trim called for in the contract with the Respondent.

21. The Claimant paid \$1,000.00 to Wayne's Painting to complete the bathroom as called for in the contract with the Respondent.
22. The Claimant paid \$402.50 to Cheryl L. Eckard for a mold inspection and report.
23. The Claimant has received an estimate of \$1,995.72 from Servpro of Washington County, Inc., for mold remediation.
24. The Claimant has received an estimate of \$3,848.35 from Servpro of Washington County, Inc., to reset or replace the basement windows; replace all damaged drywall, insulation, flooring and trim; rebuild the window well; and paint the new drywall.
25. The Claimant has received an estimate of \$7,203.00 from ValueDry to install a subfloor pressure relief system (i.e., a drain in a trench), a new sump pump, a vapor barrier, and new window wells with drains and covers to handle the water that leaks into the Claimant's basement.
26. The Claimant has received an estimate of \$1,150.00 from Bonded Applicators of MD, Inc., to replace the roof flashing and install shingles in the repaired areas.

DISCUSSION

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)).

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 Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. Additionally, the Respondent performed unworkmanlike, inadequate, and incomplete home improvements.

The Claimant obtained a HUD loan to finance the renovation of his house. According to the terms of the loan, the renovation had to be finished by July 3, 2014, or no more money would be available and the loan would expire. The Respondent signed an agreement to operate according to the terms of the loan, including the requirement that the job must be finished within six months.

The Respondent did not begin work until about six weeks after the loan closing, despite agreeing to start work within thirty days. He worked on the job through April 2014, then began ignoring the Claimant’s attempts to contact him and no longer came to the job site. On July 2, 2014, the Claimant terminated the contract because the Respondent had not finished the job, was doing no work, had not been to the job site in about sixty days, and had given the Claimant no assurances that the job would be completed. Also, the HUD loan would terminate the next day, leaving no more money available for the renovation.

Wells Fargo Home Mortgage disbursed \$35,476.47 to the Respondent through the HUD loan. The Claimant paid \$500.00 that the Respondent owed the plumber for work performed under the contract, making the total paid to or on behalf of the Respondent \$35,976.47. With the loan proceeds no longer available, the Claimant from that point on had to rely on his own

resources to complete the renovation and repair the Respondent's poor work. The deficiencies that the Respondent left when he abandoned the job are listed in Finding of Fact 15, above. According to the Claimant, the biggest problem is the water that leaks into the basement because of the Respondent's poor workmanship installing the two basement windows.

One of the windows was a double hung unit that the Respondent installed horizontally. It does not open or close and is improperly fitted into the opening in the foundation, with inadequate flashing and caulking. For the other window, the Respondent built a window well, but at the bottom put in only six inches of stone and no drain. The well fills with water during storms, and a fist-sized hole beneath the window allows water to enter the basement.

Another significant defect is the roof, where the Respondent left old, worn-out flashing in place when he replaced the other roofing materials. Water leaks into the house around the old flashing.

The evidence shows overwhelmingly that the Respondent did not complete the work called for in the contract and that much of the work he did perform was of poor quality and needed to be repaired or replaced. I thus find that the Claimant is eligible for compensation from the Fund.

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). The 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).

In addition to the \$500.00 he paid to Antietam Plumbing on the Respondent's behalf, the Claimant has paid \$9,689.31 to other contractors to finish the concrete, painting, bathroom, garage door, and electrical work that the Respondent was obliged to perform. This sum is clearly part of the claim. The Claimant also paid \$402.50 for a mold inspection and analysis that found mold infestation in the basement. This raises the question of whether the growth of mold should be considered consequential damages and thus ineligible for reimbursement.

Consequential damages are not defined in the statute, but are typically defined as “[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act.” *Black's Law Dictionary* 472 (10th ed. 2014). In this case, there is no doubt that the mold infestation resulted directly from the Respondent's poor workmanship. The evidence shows that water entered the house around the improperly installed windows and through the incompetently constructed roof. Nothing in the record suggests any other source of water or pre-existing mold. In fact, the report from MouldWorks states: “The presence of any mold infestation/airborne mold reservoir indoors can be directly attributed to moisture problems locally.” Clt. Ex. 13. These moisture problems were directly caused by the Respondent's inadequate work, and the Claimant is entitled to compensation for alleviating the intrusion of water and remediating the mold, including the amount paid for the mold testing.

However, this leads to another difficulty in calculating the amount of the recommended award. Claimant's Exhibits 17, 18, and 19 all relate to the influx of water into the basement and ridding the area of mold. The proposal from Servpro in Exhibit 17, which the Claimant

characterized as “demolition and emergency drainage,” essentially just includes tear-out of the damaged drywall, flooring, and trim; HEPA vacuuming; and application of antimicrobial agents. The estimate of \$1,995.72 does not include replacement of any damaged material or a plan to stop the leakage around the windows.

The proposal from ValueDry (Clt. Ex. 18) seems to be more of a water management endeavor than a solution to the water intrusion. For \$7,203.00, ValueDry would tear out the damaged wall material and dig a trench in the concrete slab, into which it would place gravel and a polyvinylchloride drain pipe that would empty into a sump well with a new sump pump. Drains would be placed in the window wells to direct water into the drainage system, the trench would be covered with concrete, and a vapor barrier would be installed on the walls. ValueDry would also apply antifungal agents to the affected surfaces. This proposal does not mention replacing the windows or sealing them to keep water out of the basement.

A second proposal from Servpro (Clt. Ex. 19) includes completion of the work contained in the first proposal by replacing the drywall, insulation, baseboards, and flooring, as well as finishing and painting. The proposal also calls for resetting one window, replacing the other, and digging out the window well, all at a cost of \$3,848.35.

The Claimant did not express any preference for the proposals from Servpro and ValueDry or indicate which he might accept. Obviously, though, for the work called for in the contract with the Respondent to be completed, the damage and mold in the basement must be remediated and something done to prevent further water damage and mold growth. Both Servpro and ValueDry would undertake to remove and prevent the mold, but other than that their approaches differ. However, under the ValueDry proposal, the Claimant would still be left with the improperly installed windows that originally caused all the problems in the basement. Servpro’s proposal, if successful, would keep the water out of the basement; ValueDry’s would drain the water after it

entered the basement. Although no witness, expert or otherwise, testified as to the relative merits of the proposals, I believe that the Claimant would be better served by having the defects in the windows addressed, as proposed by Servpro. Servpro's plan also seems more complete, as it contemplates replacement of damaged material and painting, whereas ValueDry's does not. Therefore, I shall include \$5,844.07, the sum of the two Servpro proposals, in the claim, and exclude the ValueDry proposal.

Additionally, the Claimant has received an estimate of \$1,150.00 to remove and replace the old flashing on the roof and re-install shingles after new flashing has been put in place. This work is clearly necessary to complete the contract.

At this point, a third difficulty arises with the calculations. According to the evidence, although the contract price was \$48,491.00, this entire sum was to be paid out of the HUD renovation loan through Wells Fargo Home Mortgage. Because of the Respondent's delays and ultimate abandonment of the job, the loan was terminated and the contract price was no longer available to either the Claimant or the Respondent. Therefore, the \$48,491.00 original contract price was "too unrealistically . . . high to provide a proper basis for measuring actual loss." COMAR 09.08.03.03B(3)(c). As permitted by that regulation, I shall adjust the contract price to reflect what was actually available under the HUD loan, \$35,476.47. To do otherwise would penalize the Claimant for the Respondent's failings.

Having resolved these points, the calculations under COMAR 09.08.03.03B(3)(c) are as follows:

\$35,976.47 paid to or on behalf of the Respondent; plus
+17,085.88 paid or required to be paid to repair and complete the work;³ equals
\$53,062.35 minus
-35,476.47 the adjusted contract price; equals
\$17,585.88 actual loss.

Pursuant to the applicable law, 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), (5). The Claimant's actual loss is less than \$20,000.00 and is also less than the amount paid to the Respondent. Accordingly, the Claimant is entitled to recover the entire actual loss.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$17,585.88 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$17,585.88; 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

³ This sum comprises \$5,400.00 for concrete work, \$100.00 to adjust the garage door, \$2,239.31 to complete electrical work, \$1,950.00 for painting and completion of the bathroom, \$402.50 for the mold inspection, \$5,844.07 to Servpro, and \$1,150.00 to repair the roof.

under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;⁴ and

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

Signature on File

August 7, 2017
Date Decision Issued

Richard O'Connor
Administrative Law Judge

ROC/sm
#169039

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 12th day of September, 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.

Sachchida Gupta

***Sachchida Gupta
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION