

IN THE MATTER OF THE CLAIM
OF ANTON VOINOV,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF EDGAR GRAMAJO,
T/A E & G CONTRACTORS, INC.,
RESPONDENT

* BEFORE TRACEY JOHNS DELP,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-18-09834
* MHIC No.: 17 (90) 1076

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PROPOSED DECISION

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STATEMENT OF THE CASE

On May 18, 2017, Anton Voinov (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$20,000.00 in actual losses allegedly suffered as a result of a home improvement contract with Edgar Gramajo, trading as E & G Contractors, Inc. (Respondent). Thereafter, the Claimant submitted an amended claim form and continued to seek reimbursement of \$20,000.00. Code of Maryland Regulations (COMAR) 09.08.03.02C.

I held a hearing on June 18, 2018 at the Office of Administrative Hearings (OAH) in Kensington, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015).¹ The Claimant represented himself. Nicholas Sokolow, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. The Respondent failed to appear for the hearing. After waiting more than fifteen minutes, without the Respondent or anyone authorized to represent him appearing, I proceeded with the hearing.²

The contested case provisions of the Administrative Procedure Act, the Department's hearing 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. 2017); 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

Unless noted otherwise, I admitted the following exhibits on the Claimant's behalf:

- Cl. Ex. 1 - Contract, signed by the parties on March 14 and 16, 2016
- Cl. Ex. 2 - Text message from Claimant to Respondent, undated

¹ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 volume of the Maryland Annotated Code.

² After review of Fund Exhibits 1, 4, 7, and 8, as well as taking Official Notice of the OAH Notice File Copy dated April 3, 2018 with stapled U.S. Postal Service® Certified Mail® receipt and signed green Domestic Return Receipt, I determined proper hearing notice was provided to the Respondent. Bus. Reg. § 8-312(h) ("If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter."); COMAR 28.02.01.21F (Official Notice).

- Cl. Ex. 3 - Transaction Record, April 5, 2016
- Cl. Ex. 4 - Photographs marked A – O, undated
- Cl. Ex. 5 - *Marked for identification purposes only*
- Cl. Ex. 6 - Contract, signed by the parties on March 14 and 16, 2016, with handwritten notes by Claimant
- Cl. Ex. 7 - Contract termination email from Claimant to Respondent, May 15, 2016; Email response from Respondent to Claimant, May 15, 2016, with attachment
- Cl. Ex. 8 - Photographs marked A – G, undated
- Cl. Ex. 9 - Proposal, Zelaya General Contractors, LLC, May 22, 2016
- Cl. Ex. 10 - Email from Claimant to Geoffrey Mason, Esquire, August 29, 2016
- Cl. Ex. 11 - Erie Insurance letter to Claimant, November 29, 2016, with attachments
- Cl. Ex. 12 - *Marked for identification purposes only*
- Cl. Ex. 13 - Code Enforcement and Building Application receipts
- Cl. Ex. 14 - *Marked for identification purposes only*
- Cl. Ex. 15 - Bank of America transaction records, with attachments

No evidence was offered on the Respondent's behalf.

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 - Notice of June 18, 2018 Hearing, dated April 3, 2018
- GF Ex. 2 - Hearing Order, March 23, 2018
- GF Ex. 3 - Respondent's MHIC Licensure Information, printed June 4, 2018 (3 pages)
- GF Ex. 4 - Letter to Respondent from the MHIC, May 25, 2017, with Home Improvement Claim Form dated May 15, 2017 attached
- GF Ex. 5 - Letter from the MHIC to Claimant, June 29, 2017
- GF Ex. 6 - Home Improvement Claim Form dated July 10, 2017, with attachments
- GF Ex. 7 - Letter from the MHIC to Claimant, March 22, 2018

GF Ex. 8 - U.S. Postal Service® Certified Mail® receipt and signed green Domestic Return Receipt

Testimony

The Claimant testified and did not present additional witnesses.

The Fund did not present the testimony of any witnesses.

There was no testimony presented on the Respondent's behalf.

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- 110932. (GF Ex. 3.)
2. At all times relevant, the Claimant was the owner of a home in Montgomery County, Maryland.
3. In 2016, the Claimant decided to hire a contractor to finish the basement of his residence in order to create an income-generating apartment. The Claimant elected to contract with the Respondent. (Cl. Ex. 1.)
4. The Claimant does not own any other residential property.
5. The Claimant is not related by blood or marriage to the Respondent.
6. The Claimant is not an employee, officer, or partner of the Respondent.
7. The Claimant is not an immediate relative of an employee, officer or partner of the Respondent.
8. The contract (Contract) was signed by the Claimant on March 14, 2016, and by the Respondent on March 16, 2016.

9. The Contract price was \$39,700.00 and specified a two month completion time. The Respondent knew the project was to create a rentable apartment, and that the two month timeline was of importance to the Claimant.³

10. According to the Contract, the payment schedule was as follows:

Payment Number	Payment Amount	When Payment Due
1	33%	To start project
2	34%	Upon rough-in completion
3	"Final Payment"	Upon completion

11. The Claimant made a \$14,000.00 payment on March 16, 2016 to begin the project. (Cl. Ex. 15.)

12. There was one Change Order for \$4,500.00 for floor leveling. The Claimant paid the \$4,500.00 amount on April 5, 2016, and the Respondent advised that the additional work would not affect the project completion date. (Cl. Exs. 2 and 15.)

13. Despite the fact that the rough-in portion of the project was not complete, the Respondent asked the Claimant for the second payment ahead of schedule. The Respondent assured the Claimant that the project would be completed on time, and on April 25, 2016, the Claimant made a second payment of \$14,500.00 to the Respondent. (Cl. Ex. 15.)

14. The basement flooded during the project. In order to install a bedroom egress window, excavation was required. The Respondent left dirt, clay, and stones from the excavation in a pile on the property near a window well. During a storm, rainwater traveled down the excavation pile into the window well and entered the basement, carrying mud and silt.

³ The Contract included heating, ventilation, air-conditioning (HVAC) work. Because HVAC repairs are not under the jurisdiction of the MHIC, the Claimant removed all reference to HVAC losses when he filed his amended Home Improvement Claim Form, dated July 10, 2017. See Md. Code Ann., Bus. Reg. § 8-101. (GF Ex. 6.)

(Cl. Ex. 8 B - F.) The Claimant filed a claim with the Respondent's insurance carrier and received \$7,419.15 in settlement for the property damage.

15. The Respondent's insurance carrier's payment to the Claimant was for consequential damages, and did not affect the Claimant's ability to seek compensation from the Fund.

16. Two months after the project start date, the job was nowhere near completion:

- A skim coat of cement was not applied to the front inside wall for water proofing.
- Piping was not insulated.
- The basement entry door was not replaced with a new door and lock.
- The bedroom egress window installation was incomplete.
- The bedroom closet was incomplete.
- The bathroom remodel was incomplete.
- The boiler and water heater closet was incomplete.
- Framework around exterior wall was incomplete.
- Insulation installation was incomplete.
- Electrical work was incomplete.
- Kitchen installation to include base, wall cabinets, countertop, sink, and faucet had not begun.
- Window replacement with double pane vinyl insulated glass windows was incomplete.
- Plumbing work was incomplete.
- Drywall was incomplete.
- Baseboards were not installed.
- Priming and painting were not done.
- Tiling and carpeting were not done.

17. Two months after the project start date, the site interior contained significant debris. Holes were inexplicably drilled into the brick exterior of the home and left unrepaired. Piles of brick and rock were left in the backyard of the residence.

18. The Claimant terminated the Contract via an email to the Respondent on May 15, 2016. (Cl. Ex. 7.)

19. The Respondent claimed that the Claimant could not terminate the Contract and directed an attorney to contact the Claimant. (Cl. Ex. 7.) On August 29, 2016, the Claimant emailed counsel for the Respondent and invited the Respondent to return and complete the project. The Claimant requested that this new arrangement be memorialized in an amended contract. (Cl. Ex. 10.) The Respondent did not respond to the Claimant's offer.

20. The Respondent's efforts to resolve the Claimant's claim were not in good faith.

21. The Respondent's performance on the Contract was unworkmanlike, inadequate and incomplete.

22. The Claimant did not have funds to hire a new contractor to complete the project, and was losing potential rental income with each passing month. As a result, the Claimant completed the project himself.

23. The Claimant paid \$271.00 in permitting expenses. (Cl. Ex. 13.)

24. The Claimant paid \$8,706.25 for materials. (GF Ex. 6.)

DISCUSSION

Positions of the Parties

The Claimant alleged the Respondent performed unworkmanlike, inadequate, and incomplete work. The Respondent failed to appear after proper notice; his position is unknown.

The Fund suggested application of the formula set forth in COMAR 09.08.03.03B(3)(c) would appear appropriate.

Applicable Law and Analysis

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.

As the homeowner pursuing a claim against the Fund, 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 Civil Pattern Jury Instructions* 1:7 (3d ed. 2000)). Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.*

There is no dispute that the Respondent held a valid contractor’s license in 2016 when he and his company entered into the Contract with the Claimant. Md. Code Ann., Bus. Reg. § 8-405(a). There is no dispute that the Claimant is the owner of the subject property and that there is no procedural impediment barring him from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a), (f). The next issue is whether the Respondent performed unworkmanlike, inadequate, or incomplete home improvement due to misconduct, and if so, whether the Respondent made good faith efforts to resolve the claim. A claim may be denied if the Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d). For the following reasons, I find that the Respondent did not exercise good faith in his efforts to resolve the claim, and I find that the Claimant has proven that the Respondent performed unworkmanlike, inadequate, and incomplete home improvement.

The Claimant presented credibly. He explained that against his better judgment, he paid the Contract second payment ahead of schedule because the Respondent assured him the job would be completed on time. When subcontractors began asking him for payment, and work continued to be sporadic on nights and weekends, the Claimant's concerns grew. He photographed his concerns and presented his case in an organized manner. His testimony was thorough, logical, and supported by the evidence.

The Respondent did not follow the time for performance set forth in the Contract. According to the Contract, the project should have been completed on May 15, 2016, two months after the initial payment. The Claimant photographed the condition of the job on May 15, 2016. (Cl. Ex. 4A - O.) The photographs obviously depict unfinished work. In further support of the photographic evidence, the Claimant testified a skim coat of cement was never applied to the front inside wall for water proofing. Piping was not insulated pursuant to the Contract. The basement entry door had not been replaced. Window installations were not properly trimmed and finished. Closets were not completed. The bathroom remodel was incomplete, with only a bathtub in place; no flooring, tiling, or other fixtures had been installed. Framework and insulation was incomplete. Electrical work was left unfinished, with wires hanging out of the wall and ceiling. The kitchen was not installed, and plumbing work was left unfinished. Drywall was unfinished, so walls were not primed and painted pursuant to the Contract. Additionally, baseboards, floor tile, and carpeting had not been installed.

In this incomplete state, the Claimant terminated the Contract via email on May 15, 2016. The Respondent replied immediately, stating that the Claimant could not terminate the Contract, and that the Claimant's "additional work" and "extras" would require more money and an extension of time. (Cl. Ex. 7.) The Respondent attached an invoice (Invoice), for \$6,700.00,

titled "Extra Work Completed By Home Owner Request" which contained six items of work, as follows:

1. PLUMBING: Separate the plumbing in the basement from upstairs including water lines with shut off valves in the utility room. \$1,200.00
2. HEATING: Separate the water lines for the radiator from zone 1 main level and zone 2 upstairs that include additional piping and valves to be installed. \$2,900.00
3. DRAINAGE: Install lines for the two front windows includes drainage to the sum[p] pump inside, also re-finish those two brick window well[s] with concrete. \$800.00
4. FRAMING: Build an additional close[t] by the entry door. \$900.00
5. Build an additional closet for the washer and dryer. \$500.00
6. Build an additional cage for the refrigerator. \$400.00

(Cl. Ex. 7.)

The Invoice is dated April 13, 2016, and the Claimant testified that he did not receive it until it was sent to him as an attachment to the Respondent's May 15, 2016 email. (Cl. Ex. 7.) Furthermore, the Claimant testified that he did not add or change the Contract in any way, except for the April 5, 2016 Change Order which was by written agreement and signed by both parties, for \$4,500.00 in order to properly level the basement floor. (Cl. Exs. 2 and 15.) He further explained the Respondent advised him that this flooring work would not affect the project completion date.

Upon careful review of the Invoice in conjunction with the Claimant's testimony, it seeks payment for work already included in the Contract as well as for work never done. Work identified in Invoice item one is contained within the Contract ("25 – Plumbing work will be completed as needed"). (Cl. Ex. 1.) Item two work is also contained within the Contract ("9 – All heating lines will be replace[d] with copper pipe and insulated all the pipes as needed"). (Cl. Ex. 1.) The Claimant testified that he never requested the work listed as item three, and that no such

work was completed on his property. Finally, work identified in items four, five, and six are also contained within the Contract (“19 – Install new frame all the way around the exterior wall as well as new kitchen, remodeled bathroom and closets as needed”). (Cl. Ex. 1.)

Thereafter, the Claimant testified that an attorney contacted him on behalf of the Respondent. The Claimant testified that despite the project delay and concerns he had about the Respondent’s workmanship, he attempted to negotiate project completion through the Respondent’s attorney. On August 29, 2016, the Claimant emailed counsel for the Respondent with a proposal to resolve the claim. (Cl. Ex. 10.) I found the Claimant’s offer reasonable. Among his proposed conditions, the Claimant requested completion of the project during regular business hours (not evenings and weekends), repairs to portions of the Respondent’s work that the Claimant considered unworkmanlike, and assurances that the remainder of the project would be completed properly. The Claimant testified that he did not receive a response to his offer.

Good faith is defined as “[a]state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.” *Black’s Law Dictionary* (10th ed. 2014). The Respondent’s Invoice, encompassing work contemplated by the Contract as well as work never done, and the Respondent’s lack of response to the Claimant’s August 29, 2016 offer to permit the Respondent to complete the project demonstrates that the Respondent made no good faith effort to resolve this claim.

The Claimant received an estimate from Zelaya General Contractors, LLC (Zelaya) to complete the project. Zelaya requested \$28,000.00 (labor, material, and dumping fee) to remove exterior debris and complete the project, excluding electrical work. The estimate does not

provide a breakdown of anticipated hours of labor and what materials would be purchased. Electrical work would cost an additional \$9,500.00 (labor and material). (Cl. Ex. 9.) Likewise, hours of labor for the electrical work is not spelled out in the estimate, nor are the materials to be purchased identified. The Claimant testified that he did not have the funds to hire another contractor, and instead completed the entire project himself. He testified that he studied and sat for an electrical examination in order make repairs to the Respondent's electrical work and to complete the remainder of the entire project himself. In addition, the Claimant testified that he discovered other errors made by the Respondent that he rectified, which included improper installation of a radiator and failing to install safety caps and shut off valves.

I find that the Respondent abandoned the project, without justification, and left the project in an unworkmanlike, inadequate and incomplete state. Md. Code Ann., Bus. Reg. § 8-605(1). Accordingly, I find that the Claimant is eligible for compensation from the Fund. Having found eligibility for compensation, I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover.

The Claimant is seeking \$20,000.00 in compensation from the Fund, the maximum award permitted. Md. Code Ann., Bus. Reg. § 8-405(e)(1). He calculated his losses as follows:

Labor and partial materials cost to correct and complete non-electrical and non-HVAC work under the contract	\$28,000.00
Labor and partial materials cost to correct and complete electrical work under the contract	\$9,500.00
Cost of materials purchased from Winnelson, Home Depot, Lowe's, and Ace Hardware	\$8,706.25
Permitting expenses	\$271.00
TOTAL	\$46,477.25

(GF Ex. 6.) The Claimant had receipts to corroborate his \$8,706.25 and \$271.00 losses. During cross-examination, the Claimant was asked how he arrived at the \$28,000.00 and \$9,500.00 amounts used in his calculations. He responded that he took the \$28,000.00 and \$9,500.00

figures from Zelaya's estimate. (Cl. Ex. 9.) The Claimant explained that he used those amounts because he is seeking the cost of his own labor.

"The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor." COMAR 09.08.03.03B(2). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. COMAR 09.08.03.03B(3). In this case, the Respondent performed some work under the Contract, and the Claimant completed the remaining work himself. Therefore, as the Fund suggested in summation, the following formula appropriately measures the Claimant's actual loss:

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).⁴ Applying the plain language of the regulation, the Claimant may add "any reasonable amounts the claimant has paid or will be required to pay." *Id.* The Claimant did not pay for his own labor. While a unique measurement may have been appropriate in this matter, the Claimant did not offer any evidence of how many hours he actually spent to complete the project. *See* COMAR 09.08.03.03B(3). He did not testify whether he had taken leave from his employment, and if so, what is the value of that time.

⁴ I am unable to evaluate this case pursuant to COMAR 09.08.03.03B(3)(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.") There was no evidence presented regarding the value of the materials and services provided by the Respondent.

Instead, he offered figures from Zelaya’s estimate. (Cl. Ex. 9.) The Claimant identified the \$28,000.00 and \$9,500.00 amounts as “labor and partial materials cost[s],” but he did not provide an itemized breakdown for those figures as he did for his \$8,706.25 and \$271.00 figures. (GF Ex. 6.) I am unable to discern how much the Claimant attributes to labor and how much he attributes to partial materials costs in both the \$28,000.00 and \$9,500.00 figures. The requests for \$28,000.00 and \$9,500.00 are speculative and uncorroborated; therefore, I cannot consider them.

Three numbers are required for the calculation pursuant to COMAR 09.08.03.03B(3)(c). The first number is the amount the Claimant paid under the Contract. The testimony and evidence offered by the Claimant established that this amount is \$33,000.00 (\$14,000.00 + \$14,500.00 + 4,500.00). The second is “any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work under the contract.” The Claimant established the amount is \$8,977.25 (\$8,706.25 + \$271.00). The final number is the Contract price, \$44,200.00 (\$39,700.00 + \$4,500.00). Thus, the Claimant’s actual loss is zero, and the Claimant is not entitled to a recovery from the Fund.

Amount paid to Respondent under the original contract	\$33,000.00
Plus reasonable amounts the Claimant has paid or will be required to pay	+ \$8,977.25
	\$41,977.25
Less the original contract price	- \$44,200.00
Actual loss	0

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual loss as a result of the Respondent's acts and omissions. Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3).

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

August 17, 2018
Date Decision Issued

Tracey Johns Delp 1K5
Administrative Law Judge

TJD/dlm
#175198

PROPOSED ORDER

WHEREFORE, this 14th day of September, 2018, 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