

**IN THE MATTER OF THE CLAIM  
OF THELMA KOONTZ,  
CLAIMANT  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF MICHAEL BARNES,  
T/A FINAL TOUCH HOME  
IMPROVEMENTS, LLC,  
RESPONDENT**

**\* BEFORE MICHAEL D. CARLIS,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\*  
\*  
\* OAH No.: DLR-HIC-02-18-24269  
\* MHIC No.: 17 (05) 1285**

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**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSION OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On October 16, 2017, Thelma Koontz (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (Commission)<sup>1</sup> Guaranty Fund (Fund) for an actual loss of \$11,377.69 as a result of a home improvement contract with Michael Barnes, trading as Final Touch Home Improvements, LLC (Respondent). On July 30, 2018, the Commission ordered a hearing to allow the Claimant an opportunity to prove her Claim. On August 1, 2018,

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<sup>1</sup> The Commission is part of the Department of Labor, Licensing, and Regulation (Department). Md. Code Ann., Bus. Reg. § 2-108(a)(15) (2015).

the Commission transmitted the case to the Office of Administrative Hearings (OAH) to conduct a hearing.

On December 31, 2018, I held a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). Trevor M. Addie, Esquire, and Horman Nichols, LLC, represented the Claimant, who was present at the hearing. The Respondent represented himself. Andrew J. Brouwer, Assistant Attorney General, and the Office of the Attorney General, represented the Fund.

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. 2018); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

### ISSUES

The issues are:

- A. Whether the Claimant sustained an actual loss compensable by the Fund as a result of the Respondent's acts or omissions; and, if so,
- B. What is the amount of that loss?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted the following exhibits offered by the Claimant, except as indicated:<sup>2</sup>

Claimant Ex. 1: Proposal from the Respondent, not dated or signed;

Claimant Ex. 2: Clearer copy of Claimant Ex. 1;

Claimant Ex. 3: Email from Respondent to the Commission, dated August 20, 2017;

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<sup>2</sup> Claimant 15A was not admitted as an exhibit, but it is part of the file as an aid used by the Claimant during her closing argument.

- Claimant Ex. 4: Checks, with various dates and amounts;
- Claimant Ex. 5: Text messages, dated May 2 and 7, 2017;
- Claimant Ex. 6: Text messages, at least one dated May 8, 2017;
- Claimant Ex. 7: Complaint Form, dated May 22, 2017;
- Claimant Ex. 8: Letter from the Commission to the Respondent, dated July 12, 2017;
- Claimant Ex. 9: Letter from the Claimant to the Respondent, dated July 13, 2017;
- Claimant Ex. 10: Letter from the Claimant to the Commission, dated September 5, 2017;
- Claimant Ex. 11: Home Improvement Claim Form, dated September 19, 2017;
- Claimant Ex. 12: Lamy Remodeling & Construction (Lamy) Estimate, dated August 2017;
- Claimant Ex. 13: Lamy's Independent Contractor Agreement, not dated or signed;
- Claimant Ex. 14: Checks to Lamy, dated in November and December 2017 and January 2018;
- Claimant Ex. 15: Receipts and other documents from Home Depot;
- Claimant Ex. 16: Emails from Lamy to the Claimant, dated October 30, 2017, and December 1, 2017;
- Claimant Ex. 17: Not admitted; and
- Claimant Ex. 18: Licensing information related to Lamy.

I admitted the following exhibits offered by the Respondent:

- Respondent Ex. 1: Proposals from the Respondent, not dated or signed;
- Respondent Ex. 2: Proposal from the Respondent, not dated or signed;
- Respondent Ex. 3: Emails, dated June, August, and September 2017;
- Respondent Ex. 4: Letter to Lowery, dated September 5, 2017, with an attachment;
- Respondent Ex. 5: Text message, dated in August 3, 2017;
- Respondent Ex. 6: Text messages, dated May 18, 2017, and July 19, 2017; and
- Respondent Ex. 7: Text messages, dated in August 2017.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1: Hearing Order, dated July 30, 2017;

Fund Ex. 2: Notice of Hearing, dated September 9, 2018;

Fund Ex. 3: Home Improvement Claim Form; and

Fund Ex. 4: Licensing status for Lamy.

### Testimony

The Claimant and Respondent testified for themselves. The Fund offered no 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 registration number 97009.
2. In or sometime after August 2016, the Claimant and the Respondent entered into a verbal home improvement contract<sup>3</sup> to renovate the kitchen and two bathrooms at the Claimant's residence.
3. The Claimant resides at the residence and does not own more than three residences or dwelling places.
4. The original verbal agreement was modified at least two times, meaning the scope of work was expanded. The final agreed-upon contract price was \$19,950.00.
5. The Claimant paid \$19,975.70 to the Claimant for his work on the home improvement. Sometime in or after March 2017, the Respondent stopped work on the home improvement before it was complete.

<sup>3</sup> A "home improvement contract" is "an oral or written agreement between a contractor and an owner for the contractor to perform a home improvement." Md. Code Ann., Bus. Reg. § 8-101(h) (Supp. 2018). An "owner" includes a "homeowner." *Id.* § 8-101(k). A "home improvement" includes an "alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a . . . part of a building that is used . . . as a residence . . ." *Id.* § 8-101(g)(1)(i).

6. Sometime in October 2017, the Claimant hired Lamy to complete the home improvement.

7. The Claimant paid \$2,762.67 for materials and \$2,587.89 for labor, or a total of \$5,350.56, to Lamy to complete the parties' home improvement agreement.

8. The Claimant is not the spouse or immediate relative of the Respondent. She is not an employee, officer, or partner of the Respondent or a relative of an employee, officer, or partner of the Respondent.

## DISCUSSION

### *Summary of the Parties' Cases*

#### **The Claimant**

The Claimant and the Respondent were, according to the Claimant, "close" friends when, in August 2016, they entered into a verbal contract for improvement to her residence in Frederick, Maryland.<sup>4</sup> The Claimant identified Claimant Ex. 1 as the "proposal" given to her by the Respondent.<sup>5</sup> The proposal is not dated or signed by either party. It lists, as written, the following fifteen items:

- new cabinets,
- new countertop,
- tile floor for kitchen and laundry room,
- remove wall "all electric and plumbing" right side of kitchen,
- add recess lights in kitchen, four pendent lights over pass through, dining lights, and hall lights,
- two new ceiling fans,
- tile back splash in kitchen,
- "handle" cabinets,
- new vanities and "top" in bathrooms,
- new toilet and faucets in kitchen and bathrooms,
- paint entire unit,

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<sup>4</sup> The Claimant described her residence as an approximately 1,000 square feet townhouse with two bedrooms and two bathrooms.

<sup>5</sup> Claimant Exs. 1 and 2 are identical copies of the contract. Claimant Ex. 2 was offered because it was purportedly easier to read.

- “wash machine” pan and new dryer vent,
- remove all wallpaper,
- paint ceiling – main area, and
- new garbage disposal.

Claimant Ex. 1 also lists the following monetary amounts: \$18,875.00, \$4,556.70, \$4,500.00, \$3,000.00, \$1,800.00, \$466.00, and \$1,400.00. The Claimant did not specifically address these figures during her testimony, except to acknowledge the \$18,875.00 was the total listed cost for the renovation.

The Claimant testified the parties did not add to the “agreement” or agree to any extra work. However, when she identified Claimant Ex. 3 as “something” the Respondent gave to her, she acknowledged it listed extra work to which she and the Respondent had agreed. Claimant Ex. 3 appears to be an email from the Respondent to the Commission, dated August 20, 2017, which states, as written:

Final touch home improvements going send Tammy Koontz refund for the 2 bathrooms where the work has not been started and for the middle guest bedroom that has not been painted yet never started.<sup>6</sup> Will be adding in refund for the threshold reducer strip at kitchen entryway and money back for the pantry doors that are not done yet. As for overpayment there is not any there is another invoice shows more extra work been added to the job which was the following work that we had talked about and she was completely aware of as it was talked about and she gave the go ahead for the work. The list of work is listed below.

- 1) black white ceramic tile bathroom floor
- 2) new bathroom light fixtures and towel bars and paper holder
- 3) new tooth brush holder
- 4) replace mirror hall bathroom
- 5) new hardware laundry room doors and cut modify fit after tile floor
- 6) pick up new washer machine and install from Home Depot
- 7) supply new hoses for washer
- 8) supply install new matching plug and switch plates main area.

Total refund to Tammy Koontz for the unfinished work \$4300.00[.]

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<sup>6</sup> The parties agreed no refund was actually made.

Claimant Ex. 3. The Claimant agreed it was a "fair" statement to say that Claimant Exs. 1 and 3 represented the full scope of work to which she and the Respondent had agreed.

The Claimant testified she had a verbal agreement with the Respondent that she would pay for materials that he provided for the home improvement. She testified she paid the Respondent by check and identified Claimant Ex. 4 as copies of those checks. Claimant Ex. 4 contains nine checks made payable to "Final Touch Home" as follows:

August 9, 2016	\$4,556.70
August 26, 2016	\$4,500.00
September 14, 2016	\$3,000.00
January 17, 2017	\$1,800.00
February 14, 2017	\$ 466.00
March 3, 2017	\$1,400.00
March 13, 2017	\$3,153.00
March 21, 2017	\$ 875.00
April 25, 2017	<u>\$ 225.00</u>
Total	\$19,975.70

Claimant Ex. 4.<sup>7</sup>

The Claimant testified that she, an inspector from the Commission, and the Respondent met at her home on August 4, 2017.<sup>8</sup> According to the Claimant, the inspector said the home improvement should have been completed in two to three weeks. The Claimant also testified the inspector told the Respondent to leave the meeting because the Respondent became "upset." She could tell the Respondent was upset by "looking at him" and because he "raised" his voice.

The Claimant testified the Respondent failed to complete the home improvement. She identified Claimant Ex. 10 as the list of materials she purchased, but the Respondent never used.

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<sup>7</sup> In a May 2017 complaint to the HIC, the Claimant averred the following: (1) the home improvement contract (which is Claimant Exs. 1 and 2 and Respondent Ex. 1) was drafted on August 9, 2016; the amount of the contract was \$18,875.00; and the amount she paid the Respondent was \$19,975.70. In a letter the Claimant sent to the Respondent on July 13, 2017, she said she had paid him \$22,000.00. Claimant Ex. 9. At the hearing, the Claimant said the \$22,000.00 figure was incorrect because "I added receipts wrong." On the Claim she submitted to the Commission, the Claimant said she paid \$19,750.70 to the Respondent.

<sup>8</sup> This meeting was at the Commission's request.

She testified she based the cost of the materials on the receipts contained in Claimant Ex. 15.

According to the Claimant, the receipts in Claimant Ex. 15 are for materials Lamy told her it needed to complete the improvement. Claimant Ex. 10 is reproduced below:

1. Shower faucet (1)	\$083.40 x 1 =	\$0083.40
2. Vanity and Tops (2)	\$695.00 x 2 =	\$1390.00
3. Toilets (2)	\$119.00 x 2 =	\$0238.00
4. Vanity Faucets (2)	\$094.00 x 2 =	\$0188.00
5. Black tiles (3 boxes)	\$035.84 x 3 =	\$0107.52
6. Vanity Mirror (2)	\$074.00 x 2 =	\$0148.00
7. White tiles (14 boxes)	\$016.64 x 14 =	\$0232.96
8. Vanity lights (2)	\$083.99 x 2 =	\$0167.98
9. Custom Pantry Door (1)	\$062.97 x 1 =	\$0062.97
10. 1 Gallon of paint for Master Bath	\$036.98 x 1 =	\$0036.98
11. 1 Gallon paint for guest bath	\$042.98 x 1 =	\$0042.98
12. 1 10lb. of Grout	\$014.37 x 1 =	\$0014.37
13. 1 Gallon of paint for guest bed	\$014.98 x 1 =	\$0014.98
14. Flooring for Master Bath (2 cases)	\$055.93 x 2 =	\$0111.86
15. Flooring for Guest Bath (5 linear feet)	\$006.35 x 5 =	\$0031.75
16. Tooth brush holder (2)	\$005.98 x 2 =	\$0011.96
TOTAL		\$2883.71
TAX 6%		<u>\$0173.02</u>
FINAL TOTAL		\$3056.73

#### Claimant Ex. 10.

The Claimant testified she hired Lamy to complete the home improvement. According to the Claimant, the incomplete work included "both bathrooms and guest room work." The Claimant testified she purchased the materials for Lamy's work. She testified Claimant Ex. 15 contains the receipts from those purchases. The Claimant also testified she paid Lamy by check upon the completion of the home improvement.

Claimant Ex. 12 is an estimate prepared by Lamy on August 28, 2017. The estimate is for a "hallway bath," "master bath," and "kitchen." It describes what work is to be done and its cost; for example, "detach and reset toilet" in the hallway bath for \$257.27. The estimate lists sixteen work activities in the hallway bath for \$2,055.77; twenty-four work activities in the master bath for \$4,889.53; and two work activities in the kitchen for \$499.96. The total listed



cost is \$7,445.26. This document is not signed, and it is not apparent whether the cost includes labor and materials.

Claimant Ex. 13 is an "Independent Contractor Agreement" from Lamy; it is unsigned and undated. It lists a "[t]wo bathrooms up-grade" as the "[s]ervices provided" and "scope." The cost is \$6,895.30 for "services rendered," and it provides for "reimbursement" of "expenses" upon "statements and vouchers to [the Claimant] for all such expenses."

Claimant Ex. 14 contains four checks the Claimant gave Lamy: \$3,000.00 on November 1, 2017; \$2,800.00 on November 11, 2017; \$1,814.57 on December 2, 2017; and \$560.00 on January 27, 2018. The total amount of these checks is \$8,174.57. The Claimant testified these payments were for the completion of the home improvement agreement she had with the Respondent.

### **The Respondent**

The Respondent testified that he completed eighty-five percent of the items listed on Claimant Exs. 1 and 2 and Respondent Ex. 1.<sup>9</sup> He identified the following as the items he completed:

- new cabinets,
- new countertop,
- tile floor for kitchen and laundry room,
- remove wall "all electric and plumbing" right side of kitchen,
- add recess lights in kitchen, four pendent lights over pass through, dining lights, and hall lights,
- two new ceiling fans,
- tile back splash in kitchen,
- "handle" cabinets,
- paint entire unit,
- "wash machine" pan and new dryer vent,
- remove all wallpaper, and
- paint ceiling – main area.

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<sup>9</sup> Claimant Exs. 1 and 2 and Respondent 1 are almost identical in content. The only differences are that Claimant Exs. 1 and 2 contain a "new garbage disposal," which is not listed in Respondent Ex. 1.

Respondent Ex. 1.<sup>10</sup> The Respondent did not refute that he did not complete the (1) “new vanities and tops bathrooms” and (2) “new toilet and faucets . . . bathrooms.”

The Respondent also testified the Claimant requested in March 2017 that he do the following additional work:

- tile the master bath floor,
- new lights, towel holder, and toilet paper holder in bathrooms,
- new mirror in hall bathroom,
- install new washing machine,
- provide new electrical cover plates, outlets, and switches throughout the townhouse,
- modify laundry room door,
- replace foyer light,
- remove track lighting in living room and patch and paint drywall,
- install new dishwasher, stove, and refrigerator, and
- paint and rehang picture throughout townhouse, except spare bedroom.

Respondent Ex. 2 lists the tasks the Respondent testified became part of the original contract in March 2017, as follows:

- 1) tile bathroom floor master,
- 2) new bathroom lights and towel bars and paper holder,
- 3) install new washer pick up store new hoses,
- 4) new cover plates on outlets and switches,
- 5) mirror hall bath
- 6) new hardware laundry room doors,
- 7) new foyer light,
- 8) new light back corner living room
- 9) set new appliances she bought,
- 10) hang all her pictures, and
- 11) remove track lighting and patch drywall living room.

Respondent Ex. 2. According to the Respondent, the cost for the additional items listed at

Respondent Ex. 2 was \$1,075.00, making \$19,750.00 the total cost of the home improvement.<sup>11</sup>

<sup>10</sup> The Respondent used an orange highlighter to identify the items on Respondent Ex. 1 that he completed.

<sup>11</sup> Respondent Exs. 1 and 2 contain three separate descriptions of the scope of work. None is signed by both parties or dated. Respondent Ex. 1 contains two lists: one of the same work as listed on Claimant Exs. 1 and 2, excluding the new garbage disposal for \$18,875.00; and the other of the first eight items on Respondent Ex. 2 for \$875.00. Respondent Ex. #2 contains the same list of eight items, plus three additional items for \$1,075.00.

The Respondent agreed \$18,875.00 was the total cost of the home improvement before the March 2017 additions. He testified he purchased all the materials for the work he did, except the kitchen appliances. He also testified the \$4,556.70 was for the purchase of kitchen cabinets; \$4,500.00 was for the kitchen countertop; \$3,000.00 was for kitchen tile and plumbing and electric supplies, \$1,800.00 was for lighting in the kitchen, dining room, and hallway; and \$466.00 was for two vanities in the bathrooms.<sup>12</sup>

The Respondent testified he began the home improvement toward the end of December 2016 or in January 2017. He testified the last day he worked on the home improvement was May 12, 2017. He later testified he was "actively working" until August 4, 2017. The Respondent testified he wanted to finish the home improvement, but the Claimant would not respond to his or his wife's telephone calls to make those arrangements.

The Respondent also specifically addressed each item on the Lamy estimate. The Respondent agreed that the following items were within the scope of his agreement with the Claimant:

#### Hallway Bathroom

- Seal/prime then paint the walls and ceiling (2 coats)
- Detach & Reset Toilet
- Detach & Reset Vanity
- Detach & Reset Countertop – solid surface
- Detach & Reset Sink faucet - Bathroom
- Detach & Reset Mirror – ¼" plate glass
- Paint door slab only – 2 coats (per side)

#### Master Bathroom

- Seal prime then paint the walls and ceiling (2 coats)
- Detach & Reset Toilet
- Detach & Reset Vanity
- Detach & Reset Countertop – solid surface

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<sup>12</sup> These figures are listed at Claimant Exs. 1 and 2. The Respondent could not remember for what the \$1,400.00, also listed at Claimant Exs. 1 and 2, was used.

- Detach & Reset Sink faucet – Bathroom
- Install Ceramic porcelain tile
- Paint door slab only 2 coats (per side)
- Paint door or window opening – 2 coats (per side)

#### Kitchen

- Door Installer/Finish Carpenter – per hour.

### *The Positions of the Parties*

#### **The Claimant**

The Claimant argued Claimant Exs. 1 and 3, and her testimony about the bathrooms, are proof of a home improvement contract. She further pointed out that the Respondent agreed the home improvement was incomplete. The Claimant further argued she paid \$19,750.70 to the Respondent and \$11,574.15 to Lamy (\$8,174.57 for labor and \$3,399.58 for materials) to complete the home improvement. Finally, the Claimant argued she incurred an actual loss of \$12,674.85, which she calculated as follows:  $\$19,750.70 + \$11,574.15 = \$31,324.85 - \$18,875.00 = \$12,449.85$ .

#### **The Respondent**

The Respondent argued he worked on the kitchen into August 2017 and had completed eighty-five percent of it. He also argued he was willing to complete the job within ten working days, but the Claimant refused him permission to do so. In addition, he argued he will not pay for work completed by another contractor that was outside the scope of work in his agreement with the Claimant.

#### **The Fund**

The Fund argued the Claimant's actual loss is limited to \$11,377.69, the amount on her Claim form.

The Fund also argued the Claimant had proved an actual loss, and the only disputed issue is whether the "shower and tub" were part of the original contract's scope of work. If not, those

costs must be excluded from the calculation of actual loss. Finally, the Fund argued the correct formula for the calculation of actual loss is the cost of the original home improvement contract plus the cost to complete the unfinished home improvement minus the cost of the original contract. According to the Fund, the cost of the original contract was \$19,950.00, and the amount the Claimant paid to Lamy to complete the contract was \$11,574.15.

### *Analysis*

#### **Legal context**

The Claimant has the burden of proof 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)).

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). A homeowner may receive compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” *Id.* § 8-405(a); *see also* COMAR 09.08.03.03B(2) (The “Fund . . . compensates claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor.”).<sup>13</sup>

#### **A preliminary consideration**

The parties participated in a “job site inspection conference” with an inspector from the Commission on August 4, 2017. The conference apparently did not go well; however, at the conference, the Respondent testified he indicated his willingness to complete the home

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<sup>13</sup> The Claimant acknowledged she was satisfied with the quality of the Respondent’s work.

improvement or "reimburse" the Claimant up to \$5,000.00 to resolve their dispute. The Respondent also testified he and his wife had left telephone messages with the Claimant in an attempt to schedule a time for him to resume work on the home improvement, but the Claimant did not respond.

The Claimant testified she did not want the Respondent to return to complete the home improvement because she "was going to be afraid that he would come back and do unworkmanlike work,"<sup>14</sup> and she rejected "reimbursement" because the amount was insufficient to pay another contractor to complete the work.

Section 8-405(d) of the Business Regulation Article provides as follows: "The Commission may deny a claim if the Commission finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann. Bus Reg. § 8-405(d) (2015). For the following reasons, I decline to apply this statutory subsection to this case.

Foremost among those reasons is the record is insufficiently developed to make the requisite findings of "unreasonably rejected" and "good faith" effort. Second, the record includes some evidence of rancor between the parties, at least during the job site inspection conference. This militates against finding "unreasonably rejected" because it provides some support for the Claimant's concern about the quality of the Respondent's work if she were to have agreed to allow him to resume work. Finally, although the parties dispute when work on the home improvement began (August 2016 versus the end of December 2016 or January 2017), by August 2017 it remained unfinished. This protracted period of time supports the Claimant's argument with respect to the Respondent's commitment to completion of the work and militates against finding both "good faith" offer and "unreasonably rejected." For these reasons, I am not persuaded that section 8-405(d) prohibits an award of actual loss.

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<sup>14</sup> The Claimant testified she was satisfied with the work the Respondent had completed.

## Was there an incomplete home improvement?

The parties agreed the home improvement was left incomplete. Although the record does not contain a properly executed written home improvement contract, the record clearly establishes an oral home improvement agreement. Moreover, the parties agreed in large part about the scope of work and cost of the home improvement agreement. They agreed that Claimant Exs. 1 and 2<sup>15</sup> include a large part of the scope of work and the cost for that work.

Claimant Exs. 1 and 2 include the following:

- new cabinets,
- new countertop,
- tile floor for kitchen and laundry room,
- remove wall “all electric and plumbing” right side of kitchen,
- add recess lights in kitchen, four pendent lights over pass through, dining lights, and hall lights,
- two new ceiling fans,
- tile back splash in kitchen,
- “handle” cabinets,
- new vanities and “top” in bathrooms,
- new toilet and faucets in kitchen and bathrooms,
- paint entire unit,
- “wash machine” pan and new dryer vent,
- remove all wallpaper,
- paint ceiling – main area, and
- new garbage disposal.

The parties also agreed the following items listed at Claimant Ex. 3 were part of the scope of work to which they agreed:

- black white ceramic tile bathroom floor,
- new bathroom light fixtures and towel bars and paper holder,
- new tooth brush holder,
- replace mirror hall bathroom,
- new hardware laundry room doors and cut modify fit after tile floor,
- pick up new washer machine and install from Home Depot,
- supply new hoses for washer, and
- supply install new matching plug and switch plates main area.

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<sup>15</sup> See *supra* note 4.

Respondent Ex. 2 lists eleven tasks for “condo added work” for \$1,075.00.<sup>16</sup> The first eight are the same as the tasks listed on Claimant Ex. 3. The additional three tasks include: “set new appliances she bought,” “hang all her pictures,” and “remove track lighting and patch dry wall living room.” The Claimant testified she had not seen Respondent Ex. 2 before the hearing; however, she did not specifically refute the Respondent’s testimony that all the tasks at Respondent Ex. 2 became part of the parties’ verbal agreement. Accordingly, I find the full scope of work agreed upon by the parties included the following three items:

- set new appliances,
- hang all pictures, and
- remove track lighting and patch living room drywall.

Respondent Ex. 2. For this finding, I also relied on the analysis discussed below.

The Claimant testified she paid a total of \$19,750.70 to the Respondent. She also listed that amount on her Claim form. The Respondent testified in response to a question asked by the Fund, it “sounded right” that the total amount paid to him was \$19,950.00. I resolve this inconsistency by relying on the checks the Claimant wrote to the Respondent — the best evidence to resolve this issue — found at Claimant Ex. 4. The total amount of the checks is \$19,975.70. Neither party disputed those checks were written and received as payment for the home improvement. Accordingly, I find the Claimant paid \$19,975.70 to the Respondent pursuant to their oral home improvement contract.

Both parties agreed the initial cost of their contract was \$18,875.00. The Respondent claimed the total cost of the eleven additional items listed at Respondent Ex. 2 is \$1,075.00. \$1,075.00 plus \$18,875.00 equals \$19,950.00. Because the actual amount the Claimant paid to the Respondent (\$19,975.70) is only about twenty-five dollars more than the agreed upon cost of the initial contract plus the cost of the additional eleven items ( $\$19,975.70 - \$19,950.00 =$

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<sup>16</sup> The Claimant testified she had never seen Respondent Ex. 2 before the hearing.



\$25.70), this provides some support for finding the eleven additional items discussed above became part of the parties' home improvement agreement. As a result, I find the scope of work agreed to between the Claimant and Respondent included the following:

- new cabinets in kitchen,
- new countertop in kitchen,
- tile floor for kitchen and laundry room,
- remove wall "all electric and plumbing" right side of kitchen,
- add recess lights in kitchen, four pendent lights over pass through, dining lights, and hall lights,
- two new ceiling fans,
- tile back splash in kitchen,
- "handle" cabinets,
- new vanities and "top" in bathrooms,
- new faucets in kitchen and bathrooms and new toilets,
- paint entire unit,
- "wash machine" pan and new dryer vent,
- remove all wallpaper,
- paint ceiling – main area,
- new garbage disposal,
- tile master bathroom floor,
- new bathroom lights and towel bars and paper holder,
- install new washer with new hoses,
- supply new hoses for washer,
- new cover plates on outlets and switches,
- mirror in hall bathroom,
- new hardware laundry room doors,
- new foyer light,
- set new appliances,
- hang all pictures, and
- remove track lighting and patch drywall in living room.

#### **What is the Amount of Compensable Actual Loss?**

Under COMAR 09.08.03.03B there are three formulas for measurement of a claimant's actual loss. The following is the appropriate formula for the circumstances of 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)(a). Therefore, the Claimant must prove: (1) the amount she paid to the Respondent under the original contract; (2) the reasonable amount the Claimant paid to Lamy to complete the original contract; and (3) the original contract price.

Element 1 has been addressed above. The Claimant paid \$19,975.70 to the Respondent under the original contract.

Element 3 has also been discussed above. The parties did not dispute the initial price on the original contract was \$18,875.00. In addition, I have found the parties agreed on additional work sometime in March 2017 for payment of \$1,075.00. Accordingly, the original contract price was \$19,950.00.

The parties dispute element 2, the remaining element of the actual loss computation. Element 2 is the reasonable amount the Claimant paid to Lamy to complete the original contract. At the hearing, the Respondent testified he completed eighty-five percent of the kitchen. He did not specifically testify what items had not been finished. However, in Claimant Ex. 3, he admitted the two bathrooms “[have] not been started”; the guest bedroom had “not been painted yet”; and the “threshold reducer strip” at the kitchen and the pantry door had not been finished.

There was no dispute between the parties that the Claimant hired Lamy. According to the Claimant, Lamy was hired to complete the original home improvement contract. The Respondent did not dispute that the Claimant paid Lamy a total of \$8,174.57. Claimant Ex. 14 contains the four checks the Claimant wrote to Lamy for a total amount of \$8,174.57. Accordingly, I find the Claimant paid Lamy \$8,174.57 for the services he provided at the Claimant’s home.

The Claimant also testified that she paid \$3,056.73 for materials that Lamy used to complete the original contract. Claimant Ex. 10 is a list of materials she claimed to have

purchased for Lamy. The Claimant testified that she drafted the list based on receipts found at Claimant Ex. 15. Claimant Ex. 10 lists sixteen separate items and their costs. The Respondent did not dispute the following items listed at Claimant Ex. 10, although he disputed the cost of some of them:

Vanity and Tops (2)	\$695.00 x 2 =	\$1390.00
Toilets (2)	\$119.00 x 2 =	\$0238.00
Vanity lights (2)	\$083.99 x 2 =	\$0167.98
Custom Pantry Door (1)	\$062.97 x 1 =	\$0062.97
Gallon of paint for Master Bath	\$036.98 x 1 =	\$0036.98
1 Gallon paint for guest bath	\$042.98 x 1 =	\$0042.98
1 10 lb. of Grout	\$014.37 x 1 =	\$0014.37
1 Gallon of paint for guest bed	\$014.98 x 1 =	\$0014.98
Flooring for Master Bath (2 cases)	\$055.93 x 2 =	\$0111.86
Flooring for Guest Bath (5 linear feet)	\$006.35 x 5 =	\$0031.75
Tooth brush holder (2)	\$005.98 x 2 =	\$0011.96
TOTAL		\$2,123.83

In addition, the Respondent did not refute the following additional materials were needed to complete the home improvement, although he challenged the quantity and/or cost of some of the following items listed at Claimant Ex. 10:

Vanity Faucets (2)	\$94.00 x 2 =	\$188.00
Black Tiles (3 boxes)	\$35.84 x 3 =	\$107.52
Vanity Mirror (2)	\$74.00 x 2 =	\$148.00
White Tiles (14 boxes)	\$16.64 x 14 =	\$232.96
Vanity lights (2)	\$83.99 x 2 =	\$167.98
TOTAL		\$844.46
Minus (see below discussion)		\$362.00
FINAL TOTAL		\$482.46

In regard to the additional items, the Respondent testified he had agreed to tile only the master bathroom and that the quantity of tiles purchased for Lamy was excessive; he testified only one box each of black and white tiles was needed to complete the master bathroom floor. He also testified he agreed to install only one vanity mirror in the hallway bathroom.

As between the Claimant and Respondent, I did not find one any more or less a credible witness in regard to this issue than the other. Therefore, I base my finding on the cost of

materials to complete the original home improvement agreement on only those items about which the Claimant and Respondent agreed. Accordingly, I find the total cost of materials, including tax, Lamy required to complete the unfinished home improvement was \$2,762.67 ( $\$2,123.83 + \$482.46 = \$2,606.29 + (6\% \text{ of } \$2,606.29 = \$156.38) = \$2,762.67$ ). This amount reflects a reduction to the quantity of tiles to one box each for the white and black tiles and of the mirrors to one. While it may be accurate — although I make no finding in regard to this — that the Respondent could have purchased some of the included materials for less, it does not matter here because this was the cost to the Claimant for items needed to complete the home improvement. Furthermore, the Respondent offered no evidence to corroborate his testimony about the cost for any of the challenged items.<sup>17</sup>

In regard to the cost of Lamy’s labor to complete the original contract, I have found that the Claimant paid \$8,174.57 labor. That amount is \$1,279.27 more than the \$6,895.30 contained in the Independent Contractor Agreement that Lamy sent to the Claimant in October 2017 for the “two-bedroom upgrade” and \$729.31 more than the estimate Lamy submitted to the Claimant in August 2017.

The Respondent testified that he never agreed to do any home improvement work related to the removal the of bath and shower in either of the Claimant’s bathrooms. He reviewed each item contained in Lamy’s detailed estimate and identified only the following tasks as within the scope of work to which he and the Claimant agreed:

Hallway Bathroom

- Seal/prime then paint the walls and ceiling (2 coats) \$240.86
- Detach & Reset Toilet \$257.27
- Detach & Reset Vanity \$148.23
- Detach & Reset Countertop – solid surface \$064.98
- Detach & Reset Sink faucet – Bathroom \$127.16

<sup>17</sup> In regard to the receipts in Claimant Ex. 15, some match the cost of the items listed in Claimant Ex. 10 and Respondent 4; however, other receipts do not match those costs and others do not identify what items were purchased.

- Detach & Reset Mirror – 1/4" plate glass \$005.61
- Paint door slab only – 2 coats (per side) \$037.87

MASTER BATH

- Seal prime then paint the walls and ceiling (2 coats) \$240.86
- Detach & Reset Toilet \$257.27
- Detach & Reset Vanity \$148.23
- Detach & Reset Countertop – solid surface \$064.98
- Detach & Reset Sink faucet – Bathroom \$127.16
- Install Ceramic porcelain tile \$444.28
- Paint door slab only – 2 coats (per side) \$037.87
- Paint door or window opening – 2 coats (per side) \$032.80

KITCHEN

- Door Installer/Finish Carpenter – per hour \$352.46

TOTAL \$2,587.89

Although the Respondent testified that he would have charged less for labor than most of the above costs, for the reasons discussed above related to the cost of materials, I find that testimony not relevant. As noted above, I do not find either party a more reliable witness than the other in regard to whether the work Lamy performed was within the scope of work of the original contract. Therefore, my finding in regard to that matter is solely based on the agreement of the parties. Accordingly, I find the Claimant paid \$2,587.89 to Lamy for labor to complete the original contract. Based on this finding, I find the Claimant paid \$5,350.56 to Lamy for labor and materials to complete the original contract (\$2,587.89 (labor) + \$2,762.67 (materials) = \$5,350.56).

As discussed above, COMAR 09.08.03.03B(3) regulates the calculation of actual loss because the Respondent did work according to a verbal home improvement contract, and the Claimant paid another contractor to complete the home improvement contract. The Claimant's actual loss is calculated as:

Amount paid to the Respondent under the original contract:	\$19,975.70
Plus the amount paid to Lamy to complete the original contract:	+ <u>\$05,350.56</u>
	<u>\$25,326.26</u>

Minus the original contract price:

- \$19,950.00  
\$05,376.26

Accordingly, I find the Claimant sustained an actual loss of \$5,376.26 as the result of the Respondent's acts and omissions.

**PROPOSED CONCLUSION OF LAW**

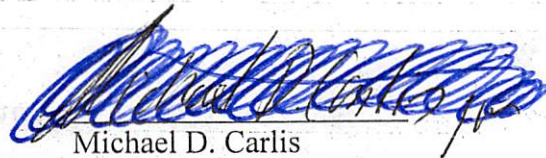
I conclude that the Claimant has sustained an actual and compensable loss of \$5,376.26 as a result of the Respondent's incomplete home improvement. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(a); COMAR 09.08.03.03B(3)(a).

**RECOMMENDED ORDER**

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

1. The Maryland Home Improvement Guaranty Fund award the Claimant \$5,376.26;
2. 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 ten percent (10%) as set by the Maryland Home Improvement Commission;<sup>18</sup> and
3. The records and publications of the Maryland Home Improvement Commission reflect this decision.

March 29, 2019  
Date Proposed Decision Issued



Michael D. Carlis  
Administrative Law Judge

MDC/da  
#178679

<sup>18</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii)(2); COMAR 09.08.01.20.

**PROPOSED ORDER**

***WHEREFORE, this 3<sup>rd</sup> day of May, 2019, 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.***

***Michael Shilling***

***Michael Shilling  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**