

<p>IN THE MATTER OF THE CLAIM</p> <p>OF TONY ABRAMOV,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF JEFFREY KENNY</p> <p>T/A X-PRESS CONTRACTING, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE STUART G. BRESLOW,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* </p> <p>* </p> <p>* OAH No.: LABOR-HIC-02-19-24105</p> <p>* MHIC No.: 17 (05) 1349</p> <p>* </p> <p>* </p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On November 7, 2017, Tony Abramov (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$6,250.00 in actual losses allegedly suffered as a result of a home improvement contract with Jeffrey Kenny, trading as X-Press Contracting, L.L.C.(Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On July 26, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on November 1, 2019 at the OAH, 1101 Gilroy Road, Hunt Valley, Maryland 21230. Bus. Reg. § 8-407(e).¹ Eric London, Assistant Attorney General, Department of Labor (Department),² represented the Fund. After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.³

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. 2019); 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

Clmt. Ex. A - Contract between the Claimant and Respondent, dated February 13, 2017

Clmt. Ex. 1 - Draw Schedule, dated February 21, 2017

Clmt. Ex. 2.- Receipt for \$9,000.00 from Respondent, dated February 23, 2017

¹ The case was originally scheduled for September 27, 2019, but was postponed to make sure that all necessary parties were served with the Notice of Hearing. The parties agreed to reschedule the hearing for November 1, 2019.

² On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

³ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on September 30, 2019, COMAR 09.08.03.03A(2), and returned as refused. Tinos Marketis, Jr., who performed work on the contract between the Claimant and the Respondent, appeared but declared that he was not representing the Respondent. Mr. Marketis advised that the Respondent was not present because he had a job on the eastern shore of Maryland that he was required to attend. The Respondent did not ask for a postponement at any time prior to and including the date of the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter.

Clmt. Ex. 3 - Receipt for \$9,300.00 from Respondent including agreement for additional HVAC work, dated April 5, 2017

Clmt. Ex. 4 - Draw three in the amount of \$5,250.00 paid, including explanation why it is not \$7,000.00 in text communications subtracting \$2,750.00 for wood flooring that the Respondent did not pay and adding \$1,000.00 for additional bathroom work, undated

Clmt. Ex. 5 - Summary of amount paid by Claimant to Respondent to date, \$23,550.00.

Clmt. Ex. 6 - Invoice from Hunt Valley Tile & Stone, LLC paid by Claimant in the amount of \$1,281.43.

Clmt. Ex. 7 - Text messages between Claimant and Respondent, dated May 16-18, 2017

Clmt. Ex. 8 - Text messages between Claimant and Respondent, dated May 16-18, 2017

Clmt. Ex. 9 - Agreement between Claimant and Tinos Marketis, dated May 30, 2017

The Respondent did not appear, therefore, no exhibits were offered for admission.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notice of Hearing, dated August 7, 2019

Fund Ex. 2 - Hearing Order, dated February 4, 2019

Fund Ex. 3 - Letter from Joseph Tunney to Respondent, dated January 29, 2018 with attached Home Improvement Claim Form, dated October 23, 2017

Fund Ex. 4 - Licensing History of Respondent, dated May 15, 2019

Fund Ex. 5 - Rescheduled Notice of Hearing, dated September 30, 2019

Fund Ex. 6 - Licensing History of Respondent, dated October 31, 2019

Testimony

The Claimant testified and presented no other witnesses.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 4981291.
2. On February 13, 2017, the Claimant and the Respondent entered into a contract (Contract) to finish the basement of his residence to include a full bathroom, bedroom with inset closet, open living area with fireplace bump out and a kitchen. (Project). Estimated start date was February 18, 2017 with an estimated completion date of May 2017. The original agreed-upon Contract price was \$39,763.00.
3. The Contract provided for a draw schedule which the Claimant agreed to on February 21, 2017. (Clmt. Ex. 1). The first draw of \$9,000.00 was paid on February 23, 2017. The second draw of \$9,000.00 was paid on April 15, 2017, along with an additional \$300.00 for additional ductwork.
4. The third draw of \$7,000.00 was not paid directly to the Respondent in full. First, an additional \$1,000.00 was added to the draw amount for wall tiles in the bathroom. From that total of \$8,000.00, the amount of \$2,750.00 was deducted from the draw because the Claimant purchased the flooring directly instead of the Respondent purchasing the flooring in accordance with the Contract. The third draw became \$5,250.00 and the Respondent acknowledged receipt of that amount on May 5, 2017.
5. Following payment of draw three, the total amount paid by the Claimant to the Respondent was \$24,550.00.
6. After the Respondent failed to complete the Project, the Claimant asked the Respondent if he could finish the Project himself, thereby terminating the Contract.

7. On May 18, 2017, the Respondent agreed to terminate the Contract and allow the Claimant to finish it.

8. On May 30, 2017, the Respondent and the Claimant entered into an agreement whereby the Respondent agreed to pay the Claimant \$6,000.00 for unfinished work within ninety days. The Respondent has not paid any amount to the Claimant.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).⁴ “[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) (2015)⁵; *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). “[A]ctual 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.

⁴ As noted above, “COMAR” refers to the Code of Maryland Regulations.

⁵ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

The Respondent performed incomplete home improvements. The Project was going well until the third draw. At that time, it became quite evident that the Respondent was having financial difficulties as well as an inability to supply labor and materials for the Project. Mr. Tinos Marketis was having family issues as well and simply did not focus on completing the Project for the Claimant.

The Claimant tried to help the Respondent by paying for the third draw in advance and by purchasing materials directly, such as the flooring and the tiles, thereby assisting the Respondent with his cash flow; however, that did not seem to help. The Respondent finally decided to walk away from the Project, but at the same time, acknowledged, in writing, that he owed the Claimant \$6,000.00. This amount was never paid. The Claimant tried to contact the Respondent on several occasions to collect the amount owed, but was unsuccessful in his efforts.

The Claimant eventually finished the Project, using a different contractor, but is not claiming these additional expenses as part of his MHIC claim. He is only seeking recovery of what he paid in advance for work that was not done by the Respondent after the Respondent abandoned the Project.

I thus 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 Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed some work under the Contract and the Claimant is not seeking other contractors to complete or remedy that work. Accordingly, the following

formula appropriately measures the Claimant's actual loss: "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." COMAR 09.08.03.03B(3)(b).

The total amount paid to the Respondent was \$24,550.00. The value of the work performed is determined through the draw schedules. In this case, the third draw was paid, although none of the work was done by the Respondent. The original third draw was for \$7,000.00. The Claimant added an additional \$1,000.00 to this figure for upgraded tiles in his MHIC claim, although the actual additional amount was \$1,280.00. From this amount, \$2,750.00 was subtracted for the purchase of the flooring by the Claimant for a total balance of 6,530.00. By subtracting this amount from the total amount paid to the Respondent, the value of the work performed by the Respondent is \$18,020.00.

The Claimant claimed \$6,250.00 as his actual loss. I have determined that he has proven an actual loss of \$6,530.00. However, he is only entitled to receive \$6,250.00.

Once a verified claim has been filed with the Commission, the claimant may not amend the claim unless the claimant can establish to the satisfaction of the Commission that either the:

(1) Claimant did not know and could not have reasonably ascertained the facts on which the proposed amendment is based at the time the claim was filed; or

(2) Claimant's proposed amendment would not prejudice the contractor whose conduct gave rise to the claim.

COMAR 09.08. 03.02

The Claimant knew the actual amount paid for the tiles as that invoice was submitted into evidence as Clmt. Ex. 6. However, the Respondent would have no way of knowing that the claim was amended at the hearing as he was not present to contest the claim. Therefore, the

Respondent would be prejudiced if the Claimant was allowed to recover his full actual loss of \$6,530.00.

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled recover his claimed amount of \$6,250.00 and not his actual loss of \$6,530.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss \$6,530.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015). COMAR 09.08.03.03B(3)(b). I further conclude that the Claimant is entitled to recover \$6,250.00 from the Fund as that was the amount of the Claimant's claim and awarding the full amount of the Claimant's actual loss would result in prejudice to the Respondent. COMAR 09.08. 03.02.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$6,250.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;⁶ and

⁶ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

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

January 15, 2020
Date Decision Issued

CONFIDENTIAL

Stuart G. Breslow
Administrative Law Judge

SGB/cj
#183207

PROPOSED ORDER

WHEREFORE, this 3rd day of March, 2020, 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

Chairman

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

