

IN THE MATTER OF THE CLAIM
OF MELINDA MUNSON

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MARYLAND HOME IMPROVEMENT
COMMISSION

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AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ACTS OR OMISSIONS
OF RAYMOND HORWATH t/a
SHORECAN CONSTRUCTION, LLC

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MHIC CASE NO. 17(90)490
OAH CASE NO. DLR-HIC-02-17-19221

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FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on October 2, 2017. Following the evidentiary hearing, the ALJ issued a Recommended Decision on December 29, 2017, concluding that the homeowner Melinda Munson (“Claimant”) failed to prove that she sustained an actual loss as a result of the acts or omissions of Raymond Horwath t/a Shorecan Construction, LLC (“Contractor”). *ALJ Recommended Decision* p. 6-7. In a Proposed Order dated February 2, 2018, the Maryland Home Improvement Commission (“MHIC”) affirmed the Recommended Decision of the ALJ to deny an award from the MHIC Guaranty Fund. The Claimant subsequently filed exceptions of the MHIC Proposed Order.

On May 17, 2018, a hearing on the exceptions filed in the above-captioned matter was held before a three- member panel (“Panel”) of the MHIC. The Claimant was represented by Steven Silverman, Esq. The Contractor did not appear. Hope Sachs, Assistant Attorney General, appeared at the exceptions hearing to present evidence on behalf of the MHIC.

The ALJ correctly states in his decision that the Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. *ALJ Recommended Decision* p. 5. In order to recover from the Fund the Claimant had to prove at the OAH hearing that she suffered an “actual loss that results from the act or omission by a licensed contractor.” Maryland

Annotated Code, Business Regulation Article (“BR”), § 8-405(a). The term “actual loss” is defined in the statute as “the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” BR § 8-401.

The ALJ held that “[t]his case comes down to an issue of credibility. . .” *ALJ Recommended Decision* p. 6. The Contractor’s business partner Michael Riordan testified that the Claimant was warned that she would need to properly insulate the crawlspace shortly after installation of the flooring in order to insure that the floor did not buckle. *Transcript OAH Hearing* p. 52-56 Mr. Riordan also testified that it was his understanding from the Claimant that she would get the insulation installed after the HVAC work was completed. *Transcript OAH Hearing* p. 55-56, 58. The Claimant, however, denied that she was warned that insulation would need to be installed. *Transcript OAH Hearing* p. 23. The ALJ specifically found the testimony of the Contractor’s partner Mr. Riordan to be credible. *ALJ Recommended Decision* p. 6. Because the ALJ found that the Claimant had been warned about the danger of not insulating the crawlspace, but did not have the crawlspace insulated after the installation of the flooring, the ALJ found that the Claimant did not meet her burden of proof that the Contractor was responsible for an “unworkmanlike, inadequate or incomplete home improvement,” related to the subsequent buckling of the floor.

The ALJ was tasked with observing the demeanor of the witnesses as they testify, judge their credibility, and ultimately make findings of fact based on this testimony. The Commission in this case will not overturn the credibility determinations of the ALJ, and the ALJ’s decision is otherwise thorough, supported by the evidence in the record and correct as a matter of law. Having heard the arguments presented by the parties, the Panel does not find that the ALJ erred in his decision and will not overturn it on exceptions.

Having considered the parties' arguments, the transcript of the hearing before the ALJ, the documentary evidence contained in the record, and the ALJ's Recommended Decision, it is this **15th** day of **August 2018 ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED**; AND
- C. That the Recommended Decision and Order of the Administrative Law Judge is **AFFIRMED**;
- D. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Bruce Ouackenbush
Chairperson –Panel
Maryland Home Improvement
Commission

IN THE MATTER OF THE CLAIM
OF MELINDA MUNSON,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF
RAYMOND HORWATH, T/A
SHORECAN CONSTRUCTION, LLC
RESPONDENT

* BEFORE STEPHEN W. THIBODEAU,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-17-19221
* MHIC No.: 17 (90) 490
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PROPOSED DECISION

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

STATEMENT OF THE CASE

On March 20, 2017, Melinda Munson (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$15,400.00 in actual losses allegedly suffered as a result of a home improvement contract with Raymond Horwath (Respondent) trading as Shorecan Construction, LLC (Shorecan).

I held a hearing on October 2, 2017 at the Office of Administrative Hearings (OAH) Kensington, Maryland office. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). Steven Silverman,

Esquire, represented the Claimant, who was present. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. The Respondent represented himself and, by a special power of attorney, Shorecan. The Respondent provided the special power of attorney form to me on October 5, 2017, and the record was closed on that date.

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

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 - Contract between the Claimant and the Respondent, dated December 10, 2013
- Clmt. Ex. 2 - Addendum to the Contract between the Claimant and the Respondent, dated January 25, 2014
- Clmt. Ex. 3 - Three personal checks from the Claimant to the Respondent, dated December 10, 2013, January 6, 2014, and May 1, 2014
- Clmt. Ex. 4 - Various photos of the condition of the flooring in the Claimant's condo, taken by the Claimant in October 2015
- Clmt. Ex. 5 - Inspection report by Certified Carpet & Surfaces Inspection Company, dated January 20, 2016
- Clmt. Ex. 6 - Labor Estimate from Heritage Contractors, LLC, dated September 20, 2016

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Hearing Order, dated June 19, 2017

Fund Ex. 2 - Notice of Hearing, dated July 3, 2017

Fund Ex. 3 - Letter from Department to the Respondent, dated April 10, 2017

Fund Ex. 4 - Department's ID Registration and License History for the Respondent, dated September 28, 2017

The Respondent did not submit any exhibits.

Testimony

The Claimant testified on her own behalf, and called the Respondent as a rebuttal witness.

The Respondent presented the testimony of Michael Riordan, the Respondent's business partner.

The Fund presented no testimony.

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 01-87078. Shorecan is a licensed home improvement corporation under a MHIC license number 05-122332. Shorecan's name was changed to Shore Windows and Doors, LLC on January 9, 2017.
2. On December 10, 2013, the Claimant and the Respondent entered into a contract to renovate the Claimant's condominium in Ocean Pines, Maryland.
3. In January 2014, the Claimant and the Respondent orally agreed to amend the contract to include the installation of 1700 square feet of hardwood flooring for \$15,400.00.

4. During a pre-installation inspection of the Claimant's condominium, Michael Riordan, the Respondent's business partner, observed that there was no insulation in the crawlspace underneath the subfloor.

5. Mr. Riordan warned the Claimant that without proper insulation of the crawlspace, the hardwood flooring would buckle and swell due to humidity and moisture.

6. The Claimant assured the Respondent that she would get the insulation installed after upgrades to the HVAC system were completed.

7. The Respondent was responsible for upgrading the entire HVAC system in the condominium in the original contract with the Claimant. However, the Respondent and the Claimant did not contract for the installation of insulation of the crawlspace.

8. Based on the Claimant's oral assurance that she would have the insulation installed later, the Respondent agreed to install the flooring and hired subcontractor Monroe Custom Trim to do the flooring work.

9. Monroe Custom Trim began installing the hardwood flooring in January 2014 and completed the work in May 2014.

10. The Claimant paid the Respondent the full amount for the work, making the last payment on May 10, 2014.

11. In April 2015, the hardwood flooring began to buckle, causing significant "cupping" and "tenting" in the floor.

12. As of the date of the hearing, the Claimant has not installed insulation in the crawlspace.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of her 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) (2015);¹ *see also* COMAR 09.08.03.03B(2) (“the Fund may only compensate claimants for actual losses they 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 not demonstrated that the Respondent performed unworkmanlike, inadequate or incomplete home improvements.

The hardwood flooring installed by the Respondent’s subcontractor buckled and cupped approximately a year after installation. The Claimant contacted the Respondent to fix the issue, but the Respondent refused. The Respondent claimed the problem was not due to faulty installation. The Respondent even contacted the manufacturer of the flooring to determine if there were reported defects in the flooring product, and there were none.

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

The Respondent maintains that the resulting cupping of the floor was not due to poor or inadequate workmanship. The Respondent's business partner, Michael Riordan, testified there was no insulation under the subfloor in the crawlspace. Because it was not a controlled environment for humidity and moisture, Mr. Riordan warned the Claimant that installing the floor without the proper insulation would cause the floor to buckle and swell. The Claimant assured the Respondent that she would get the insulation installed after HVAC work was completed.

The Claimant denies she was warned about the insulation issue. This case comes down to an issue of credibility in the testimony: whether I believe Mr. Riordan's testimony over the Claimant's testimony. In this case, I believe Mr. Riordan. He testified in great detail concerning his inspection of the subfloor, crawlspace, and the lack of insulation. He also testified that he warned the Claimant she would need to make sure she properly insulated the area shortly after the HVAC work in order to insure the floor did not buckle. Based on this conversation, the Respondent went forward with the floor installation.

The Claimant also argues that even if she was warned by the Respondent, installing the flooring before the insulation was put in meant that the Respondent's work was unworkmanlike or inadequate. Yet, the Respondent did not say that the insulation was required prior to the installation of the floor. The Respondent merely stated it would eventually have to be installed to avoid any buckling of the floor in the future. Because I believe the Claimant was warned about the danger of the floor buckling without the proper insulation in the crawl space, I find that the Claimant has not met her burden to demonstrate by a preponderance of the evidence that the Respondent is responsible for an "unworkmanlike, inadequate, or incomplete home improvement."

PROPOSED CONCLUSION OF LAW

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

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

1/1/15

December 29, 2017
Date Decision Issued

Stephen W. Thibodeau
Administrative Law Judge

SWT/cmj
171474

PROPOSED ORDER

WHEREFORE, this 2nd day of February, 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.

Andrew Snyder

Andrew Snyder

Panel B

MARYLAND HOME IMPROVEMENT COMMISSION