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| <p>IN THE MATTER OF THE CLAIM</p> <p>OF MAUREEN HYPOLITE,</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 MINNIE BAILEY</p> <p>T/A FIVE STAR CONCRETE</p> <p>CONSTRUCTION, INC.,</p> <p>RESPONDENT</p> | <p>* BEFORE BRIAN ZLOTNICK,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: DLR-HIC-02-18-21701</p> <p>* MHIC No.: 18 (75) 26</p> <p>*</p> |
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PROPOSED DECISION

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STATEMENT OF THE CASE

On October 31, 2017, Maureen Hypolite (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$13,050.00 in actual losses allegedly suffered as a result of a home improvement contract with Minnie Bailey¹, trading as Five Star Concrete Construction, Inc. (Respondent).

¹ The Claim was filed against Minnie and Duane Bailey, but as the MHIC Hearing Order only lists Minnie Bailey as the responsible contractor I will only consider her as the Respondent contractor.

I held a hearing on October 23, 2018 at the Office of Administrative Hearings (OAH) in Kensington, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015)². The Claimant represented herself. Shara Hendler, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting twenty minutes from the scheduled start time, neither the Respondent nor anyone on her behalf appeared, so 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 Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

Clmt. Ex. 1- Contract from the Respondent to the Claimant, April 8, 2017

Clmt. Ex. 2- Copy of Duane Bailey's Maryland Driver's License

Clmt. Ex. 3- Copies of April 7, 2017 check for \$4,750.00 from Claimant to the Respondent and May 23, 2017 check for \$4,750.00 from Claimant to Respondent

² Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

³ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on July 27, 2018, COMAR 09.08.03.03A(2) and was returned to the OAH on August 28, 2018 as "unclaimed." The Fund also indicated that a check of the Respondent's Motor Vehicle Administration's address of record matches the Fund's address of record for the Respondent. 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. 4- Copy of Montgomery County Building Permit, January 24, 2017
- Clmt. Ex. 5- E-mail from Respondent to Claimant, March 28, 2017
- Clmt. Ex. 6- Montgomery County Building Inspector Report, May 16, 2017
- Clmt. Ex. 7A- Photograph of footing work performed by Respondent, taken in May 2017
- Clmt. Ex. 7B- Photograph of footing work performed by Respondent, taken in May 2017
- Clmt. Ex. 7C- Photograph of footing work performed by Respondent, taken in May 2017
- Clmt. Ex. 7D- Photograph of footing work performed by Respondent, taken in May 2017
- Clmt. Ex. 7E- Photograph of footing work performed by Respondent, taken in May 2017
- Clmt. Ex. 8- Contract Proposal from Eastern Concrete Foundation, Inc., June 27, 2017
- Clmt. Ex. 9- Invoice Receipt from Eastern Concrete Foundation, Inc., stamped "Paid 11/29/2017"
- Clmt. Ex. 10- Claimant's typed complaint statement to MHIC, July 1, 2017
- Clmt. Ex. 11- Letter from MHIC to the Claimant, July 24, 2017, with attachments

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1- Hearing Order, July 3, 2018
- Fund Ex. 2- OAH Notice of Hearing, July 27, 2018
- Fund Ex. 3 - Home Improvement Claim Form, October 31, 2017
- Fund Ex. 4 - MHIC Licensing Records of Respondent, August 28, 2018

The Respondent did not submit any exhibits.

Testimony

The Claimant testified on her own behalf. The Fund did not present any witnesses. The Respondent was not present and 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 with the MHIC. (Fund Ex. 4).

2. Duane Bailey acted on behalf of the Respondent at all times involving the Claimant's project and was the Claimant's contact throughout the process. (Clmt. Ex. 10 and Testimony of Claimant).

3. On or about April 8, 2017, the Claimant and the Respondent entered into a contract to construct a basement egress and concrete patio area with steps. The contract did not have a start or completion date, but stated the job would take approximately two weeks. (Clmt. Ex. 1).

4. The agreed-upon contract price was \$14,250.00. (Clmt. Ex. 1).

5. On April 7, 2017, the Claimant paid the Respondent \$4,750.00. On May 23, 2017, the Claimant paid the Respondent \$4,750.00. The Claimant paid the Respondent a total of \$9,500.00 under the contract. (Clmt. Ex. 3).

6. The Respondent began work at the Claimant's property on May 23, 2017 by laying rebars in the ground to prepare the footing of the concrete pad. On May 26, 2017, Montgomery County conducted an inspection of the footing work and issued a failing grade because the footing work did not have a sufficient number of rebars installed to ensure the integrity of the concrete pad. The Montgomery County Inspector, Mr. Moreno, spoke to Mr. Bailey by phone on May 26, 2017 and informed him that the footing work was inadequate and needed to be repaired. (Clmt. Exs. 6 and 10).

7. The Claimant informed Mr. Bailey that she scheduled a second inspection for May 31, 2017 and Mr. Bailey told her that he would come to the property on May 27, 2017 to

correct his work. Mr. Bailey did not come to the Claimant's property on May 27, 2017 to correct his work. (Clmt. Ex. 10).

8. The Claimant called Mr. Bailey on May 27, 2017 but was unable to leave a message because his voicemail was full. The Claimant sent Mr. Bailey several text messages but he did not respond. On the morning of May 31, 2017, Mr. Bailey answered the Claimant's phone call and the Claimant reminded him that the corrections were not performed. Mr. Bailey asked to speak to the inspector but he had yet to arrive. Mr. Bailey told the Claimant that he would be at her home in thirty minutes but when the Claimant asked him if he would make the necessary corrections he abruptly hung up the phone. The Claimant cancelled the inspection and never heard from Mr. Bailey again. (Clmt. Ex. 10).

9. The Claimant made several attempts to telephone Mr. Bailey in June 2017 but either his voicemail was full or he would hang up on her. (Testimony of Claimant).

10. On June 27, 2017, the Claimant entered into a contract with Eastern Concrete Foundation, Inc., (Eastern Concrete) to correct and complete the work the Respondent abandoned. The Claimant paid Eastern Concrete \$16,175.00 for the completed work. Of the \$16,175.00 contract price with Eastern Concrete, \$2,000.00 of that price was for work that was beyond the scope of the Respondent's contract.

11. On October 31, 2017, the Claimant filed a Complaint with the MHIC.

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). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true."

Coleman v. Anne Arundel Cty. Police Dep't, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Md. Code Ann., Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time it entered into the contract with the Claimant. The Respondent performed unworkmanlike, inadequate or incomplete home improvements. The Respondent was hired to complete a new concrete pad adjacent to the Claimant’s walkout basement with steps leading to the first level of the Claimant’s home. According to the Claimant’s testimony, the Respondent, after excavation work was completed, installed footing work for the concrete pad that failed inspection due to the inadequate use of rebar.

The Claimant had a county inspector inform Mr. Bailey of the reason his work failed its inspection and what corrections were necessary. The Respondent, however, failed to come back to the Claimant’s home to correct the work and finish the contract. The Claimant made several attempts in May and June 2017 to contact Mr. Bailey but was either hung up on by Mr. Bailey or was unable to leave any messages due to a full voicemail box. The Claimant was perfectly justified in seeking another contractor to complete the Respondent’s abandoned project. The Claimant hired Eastern Concrete to complete the incomplete work left by the Respondent and paid it \$16,175.00 of which \$2,000.00 was for work beyond the scope of the Respondent’s contract.

The Respondent performed only excavation work and footing work which failed inspection. The photographs submitted into evidence indicate the Respondent's failure to complete construction of a concrete pad with steps as only a dug out area adjacent to the Claimant's home was performed by the Respondent. The Respondent only performed footing work and that was deemed unworkmanlike as it failed inspection by Montgomery County. Therefore, the work performed by the Respondent was of no value to the Claimant. 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. COMAR 09.08.03.03B(3).

If the Respondent abandoned the contract without doing any work, the Claimant's actual loss would be the amount which the claimant paid to the contractor under the contract. COMAR 09.08.03.03B(3)(a). If the Respondent performed some work under the contract and the Claimant did not solicit other contractors to complete or remedy that work, the Claimant's actual loss would 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). Neither of these apply to this case.

In this case, the Respondent performed some work under the contract, and the Claimant retained another contractor to remedy and complete that work. The contract with Eastern Concrete to complete the Respondent's contract included work valued at \$2,000.00 which was

beyond the scope of the Respondent's contract. Accordingly, 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). The calculations, therefore, are as follows:

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| \$ 9,500.00 | (Amount paid by the Claimant to the Respondent), plus |
| | (Amount paid by the Claimant to Eastern Concrete to make |
| | corrections and complete Contract work - \$16,175.00 - |
| \$ 14,175.00 | \$2,000.00), |
| \$ 23,675.00 | Subtotal |
| | Less: |
| \$ (14,250.00) | Original contract price, equals |
| \$ 9,425.00 | (Amount of the Claimant's actual loss). |

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 to recover her actual loss of \$9,425.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$9,425.00 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)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$9,425.00; and

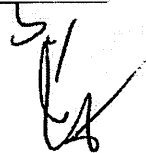
ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission⁴; and

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

Signature on File

January 15, 2019
Date Decision Issued

Brian Zlotnick
Administrative Law Judge



BMZ/cmh
#177690

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 25th day of March, 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