

IN THE MATTER OF THE CLAIM	* BEFORE JENNIFER L. GRESOCK,
OF WILLIAM AND RUTH ELLIOTT,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANTS	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF PAUL ERVIN,	*
T/A ERVIN'S LANDSCAPING, INC.,	* OAH No.: DLR-HIC-02-18-36566
RESPONDENT	* MHIC No.: 18 (90) 574

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On February 22, 2018, William and Ruth Elliott (Claimants, collectively)¹ filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,404.00 in actual losses allegedly suffered as a result of a home improvement contract with Paul Ervin, trading as Ervin's Landscaping, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On November 26, 2018 the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

¹ At the start of the hearing, the parties agreed that it was appropriate to add Ruth Elliott as a Claimant. Because both Claimants testified, I use their names in this decision when referring to them individually.

I held a hearing on April 16, 2019, at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Kris M. King, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. The Claimants represented themselves. The Respondent also represented himself.

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

1. Did the Claimants 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 Joint Exhibits:

- Jt. Ex. 1 - Contract, Ervin's Landscaping, Inc., dated May 4, 2017
- Jt. Ex. 2 - Two checks (for \$5,400.00, dated May 16, 2017, and for \$2,275.00, dated May 4, 2017)
- Jt. Ex. 3 - Statements from the Respondent, December 5, 2017

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

- Clmt. Ex. 1 - Allmaster Home Services Estimate, dated December 18, 2017, and Continental Landscaping, Inc., Estimate, dated April 3, 2019
- Clmt. Ex. 2 - Letter from Mr. Elliott to Robert Kogan, dated December 28, 2017; Statement from Mr. Elliott, undated; Photographs A through K, undated
- Clmt. Ex. 3 - Business Card for Continental Landscaping, Inc., undated

I admitted the following exhibit on the Respondent's behalf:

Resp. Ex. 1 - Page 11, Nitterhouse Masonry Products, LLC, 2018 Hardscapes Catalog

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notice of Hearing, dated March 15, 2019

Fund Ex. 2 - Hearing Order, dated November 21, 2018

Fund Ex. 3 - Home Improvement Claim Form, dated February 20, 2018

Testimony

Each of the Claimants testified; they presented no other witnesses. The Respondent testified; he also presented no other witnesses. The Fund presented 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 license number #11779.

2. On May 4, 2017, the Claimants and the Respondent entered into a contract to remove and haul away a timber wall that ran alongside the Claimants' driveway and replace it with a stone wall (Contract). The stone wall, which was to be about 48 feet long, required some excavation and a gravel base.

3. The Contract did not include a start date or timeframe for completion.

4. The original agreed-upon Contract price was \$7,675.00, including a \$2,275.00 deposit the Claimants paid at the time the Contract was signed.

5. The Respondent began work shortly after the Contract was signed. The project took two days to complete.

6. The stone wall constructed by the Respondent used smooth, finished stone only on one side, with the other side having a rough, unfinished appearance. The Respondent used

interlocking stones that require no adhesives or fasteners, which allows the wall to be repaired or expanded as needed. Only the cap stones were attached with adhesive.

7. During construction, the Respondent accidentally damaged the Claimants' fence. He repaired the fence on a later visit to the home.

8. Mr. Elliott expressed his dissatisfaction to the Respondent with some of the work at the time the project was completed. Specifically, he complained that some blocks had broken corners. The Respondent replaced some blocks at that time, but Mr. Elliott remained unsatisfied with the wall, as he felt it was not properly aligned.

9. On May 16, 2017, the Claimants paid the Respondent \$5,400.00.

10. After the stone wall was completed, it deteriorated over time, with stone blocks cracking and pieces falling off.

11. Beginning in June 2017, the Claimants repeatedly called the Respondent about broken blocks and deterioration.

12. In November 2017, the Respondent returned to the Claimants' home to replace several blocks due to Mr. Elliott's complaints. The cap blocks on top of the wall had to be removed with a hammer to replace the broken blocks beneath them.

13. In December 2017, the Respondent agreed to replace one cap stone and two stone blocks. Mr. Elliott responded that these replacements would not satisfy him, as the wall had other significant deficiencies. The repairs were not made.

14. The stone wall is in poor condition, as blocks have cracked, pieces of the wall have broken off, and the adhesive for the cap stones has come loose.

15. Due to the significant shifting and deterioration of the stone wall, the wall cannot be repaired. It must instead be replaced.

16. In December 2018, the Claimants obtained an estimate of \$4,404.00 from Allmaster Home Services for removal and replacement of the stone wall, with the replacement being substantially the same type of wall.

17. In April 2019, the Claimants obtained an estimate of \$5,950.00 from Continental Landscaping, Inc., for removal and replacement of the stone wall, with the replacement being substantially the same type of wall.

DISCUSSION

The Claimants contended that the Respondent's work was so deficient that it fell far short of a reasonably competent completion of the job. The Respondent argued that Mr. Elliott was present at the time of the work and had frequent complaints, but that he completed the work properly and according to the Contract.

In this case, the Claimants have 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).² “[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);³ *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.”

² As noted above, “COMAR” refers to the Code of Maryland Regulations.

³ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

Bus. Reg. § 8-401. For the following reasons, I find that the Claimants have proven eligibility for compensation.

There is no dispute that the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimants.

Mr. Elliott testified that he was unhappy with the Respondent's work from the start, as he wanted a double-faced wall (meaning a wall finished on both sides) and the Respondent instead constructed a single-faced wall. In addition, some blocks in the wall were cracked even at the time the wall was installed, and others have cracked and deteriorated since then. While the Respondent made some repairs, Mr. Elliott testified that the repairs were insufficient, and that the Respondent only caused more damage to the wall when he replaced the broken blocks. Specifically, the Respondent returned in November 2017 and replaced several blocks, but caused damage to the adhesive for the cap stones when he removed them. After making numerous calls to the Respondent in the months after the work was completed but receiving only grudging responses from the Respondent, Mr. Elliott gave up on having the Respondent repair the wall to his satisfaction.

Mr. Elliott explained that he then sought estimates from other contractors, who looked at the wall and then provided estimates for replacing it. While Mr. Elliott did not specifically ask about having it repaired, both contractors told him the entire wall needed to be replaced.

Ms. Elliott echoed much of Mr. Elliott's testimony, explaining that she was present at the initial meeting with the Respondent and signed the Contract. She disclosed that the project sounded expensive to her, but that she was not involved in the design and did not oversee any of the work. With regard to the unfinished side of the wall, Ms. Elliott explained that while she, Mr. Elliott, and the Respondent did not specifically address whether it should be a double-sided wall, the Claimants assumed that it would, as the placement of the wall along the driveway, with

one side facing their own home and the other facing a neighbor's, would mean that both sides were easily visible and should be finished.

She noted that the Respondent was not very careful, as he caused damage to their fence (which he later repaired at the Claimants' request). She further testified that over time, cracks have continued to appear in the wall and pieces fall out and must be swept up. Ms. Elliott stated that she was present for the second estimate in April 2019, and that the contractor from Continental Landscaping, Inc., told her the wall was not constructed properly and would need to be replaced entirely.

The Respondent testified regarding the details of the wall he built, explaining that they used a string line to lay it out and had to bend the design slightly to accommodate the neighbor's property. He noted that he has many years of experience in this work and used blocks that interlock so that the wall can easily be repaired or extended. He disputed that adhesive could be coming loose from the wall, as he used none, but then he acknowledged that the cap stones are attached with an adhesive. The Respondent further testified that he returned to the property twice after the work was completed, once to repair the fence he had damaged and then a second time to make repairs to the wall that Mr. Elliott had requested. He stated that he offered to return again when Mr. Elliott continued to call him with complaints, but that Mr. Elliott became nasty and was always adding to his complaints, so the Respondent did not return.

The Respondent maintained that the adhesive he used would not be visible to the Claimants and that the blocks are designed to last, and would therefore not deteriorate or crack. However, when presented with the Claimants' photographs of his work, the Respondent agreed that some blocks were broken and needed to be replaced. He estimated that he recalled that there were five or six damaged cap stones and ten regular blocks with damage, though the photographs did not reflect all of these. He also claimed that some of the damage may have been caused by

car doors, though when pressed on cross examination he agreed that such a scenario was unlikely.

Finally, the Respondent insisted that complete replacement was unnecessary, and that the wall could be repaired, contrary to the assessment of the two contractors who provided estimates for replacement, but not repair, of the wall. He acknowledged that the industry practice would be to provide a cost for repair, either instead of or in addition to replacement, if repair was a feasible option. The Respondent apologized to the Claimants that the matter has gone unresolved, noting that he had never had a complaint in doing this kind of work for forty years, and expressed the wish that he could have solved the problem to the Claimants' satisfaction.

Based on the evidence before me, I find that the Respondent performed inadequate and unworkmanlike home improvements. The Respondent himself acknowledged that the stone wall he built is inadequate in its current state, as blocks are cracked and broken. The Claimants established this through their testimony, which I find credible, as it was detailed, consistent, and unrefuted. In addition, the Claimants provided photographs that clearly show cracked blocks and blocks where pieces have broken off. (Clmt. Ex. 2B, 2D, 2I, 2K.) Furthermore, the Respondent did not dispute that the stone wall has these deficiencies. Despite repeated efforts by the Claimants to have the Respondent remedy the problems, the Respondent declined to do so.

While the Respondent maintained that the wall could be repaired, rather than replaced, he agreed on cross examination that such an assessment could only be made in person, that he has not seen the wall himself in its current condition, and that both of the contractors provided estimates for replacement, rather than repair, after viewing the wall in person. That the stone wall built by the Respondent is in such poor condition supports a finding that it is also unworkmanlike in its construction. I thus find that the Claimants are eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimants' actual loss and the amount, if any, that the Claimants are 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 work under the contract, and the Claimants intend to retain another contractor to remedy that work. The remedy here is only a complete replacement of the work the Respondent completed, as the Claimants have demonstrated with the two estimates they provided. (Clmt. Ex. 1.) Accordingly, the following formula appropriately measures the Claimants' 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 Claimants paid the Respondent \$7,675.00 for the work, which must be replaced in its entirety. (Jt. Ex. 1.) The cost of replacement is \$4,404.00.⁴ (Clmt. Ex. 1.) This estimate, provided by Allmaster Home Services, reflects substantially the same job completed by the Respondent, as it includes both hauling away the old wall and constructing a new one of stone,

⁴ The Claimants did not seek the amount of the estimate from Continental Landscaping, Inc., which was \$5,950.00.

with the same dimensions.⁵ These costs total \$12,079.00, from which the original contract price of \$7,675.00 is subtracted. This results in an actual loss of \$4,404.00.

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 Claimants' actual loss is less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimants are entitled recover their actual loss of \$4,404.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of \$4,404.00 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 Claimants are entitled to recover that amount from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a) (2015); COMAR 09.08.03.03B(2).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$4,404.00; and

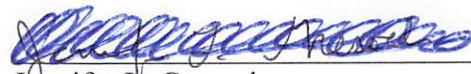
ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed

⁵ The estimate from Allmaster specifies that the wall will be "two-sided." The Claimants' Contract with the Respondent did not include this language, though I am persuaded that the Claimants reasonably concluded that the Contract required a two-sided wall, as the placement of the wall meant both sides were visible. In any case, this provision in the estimate apparently did not increase the cost, as the estimate is well below what the Claimants paid to the Respondent for a wall finished on only one side. I find that the scope of the estimate and the Contract is essentially the same.

under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;⁶ and

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

July 8, 2019
Date Decision Issued



Jennifer L. Gresock
Administrative Law Judge

JLG/dlm
#179969

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

PROPOSED ORDER

WHEREFORE, this 8th day of August, 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.

J. Jean White

***I. Jean White
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION