

IN THE MATTER OF THE CLAIM
OF JEFFREY KAUFFMAN,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF IOAN ENCIU, T/A
VALCO CUSTOM REMODELING,
INC.,
RESPONDENT

* BEFORE KATHLEEN A. CHAPMAN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: LABOR-HIC-02-19-40218
* MHIC No.: 19 (75) 1373

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PROPOSED DECISION

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STATEMENT OF THE CASE

On June 26, 2019, Jeffrey Kauffman (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),¹ for reimbursement of \$2,452.00 in actual losses allegedly suffered as a result of a home improvement contract with Ioan Enciu, trading as Valco Custom

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

Remodeling, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).² On December 2, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on July 23, 2020 via the video conferencing platform Google Meet.³ Bus. Reg. § 8-407(e). Andrew Brouwer, Assistant Attorney General, Department of Labor (Department), represented the Fund. The Claimant represented himself. The Respondent 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. 2020); Code of Maryland Regulations (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. 1 – Contract, dated April 5, 2019

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

³ This matter was originally scheduled for a hearing on April 16, 2020 at the OAH in Cumberland, Maryland. Due to the COVID-19 pandemic, the OAH suspended all non-emergency, in-person hearings beginning March 23, 2020 through April 3, 2020. On June 5, 2020, the OAH extended the suspension of in-person hearings through June 5, 2020. The OAH rescheduled the hearing to July 23, 2020; again, to be held at the OAH in Cumberland, Maryland. In light of the continuing circumstances of the pandemic and the health and safety concerns it presents, the OAH continued to suspend all in-person hearings there. In response to my July 10, 2020 letter to the parties, the parties agreed to proceed with the scheduled hearing via the Google Meet platform.

- Clmt. Ex. 2 – Photocopy of cancelled check no. 3454 in the amount of \$2,452.00; bank statement from Bulldog Federal Credit Union, statement date: April 30, 2019
- Clmt. Ex. 3 – Letter from the Claimant to the Respondent cancelling the Contract, dated May 5, 2019; Photocopy of “Get In Touch” written communication to the Respondent on the company website, undated; Returned certified mailing envelope as “Unclaimed”, mailed on May 6, 2019
- Clmt. Ex. 4 – Letter from William Banks, Investigator, MHIC, to the Claimant, dated May 29, 2019; Complaint Form, signed May 6, 2019; Letter from David Finneran, Executive Director, MHIC, to the Respondent, dated May 16, 2019; Home Improvement Claim Form, dated June 26, 2019; Letter from Joseph Tunney, Chairman, MHIC, to the Respondent, dated July 18, 2019
- Clmt. Ex. 5 – Letter from the Claimant to the MHIC, dated July 1, 2019
- Clmt. Ex. 6 – Letter from the Respondent to the MHIC, undated
- Clmt. Ex. 7 – Installment Retail Agreement Contract by AA Waterproofing, dated May 2, 2019

I admitted the following exhibits on the Respondent’s behalf:

- Contr. Ex. 1 – Letter from the Respondent to the MHIC, undated
- Contr. Ex. 2 – Contract, dated April 5, 2019; Limited Warranty, dated April 5, 2019; two sketches, undated; Pre-Renovation Form, dated April 5, 2019

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 – Hearing Order, dated December 2, 2019
- Fund Ex. 2 – Email to the parties from OAH regarding remote hearing platform, dated July 21, 2020, with attachments
- Fund Ex. 3 – Notice of Hearing, dated March 31, 2020 (for hearing scheduled for July 23, 2020)
- Fund Ex. 4 – Notice of Hearing, dated February 4, 2020 (for hearing scheduled for April 16, 2020).
- Fund Ex. 5 – Letter from Joseph Tunney, Chairman, MHIC, to Respondent, dated July 18, 2019, with attached Claim, received July 17, 2019
- Fund Ex. 6 – Licensing history, as of July 21, 2019

Testimony

The Claimant testified and presented the testimony of Jeanette Kauffman, his wife. The Respondent testified. 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 numbers 01-116223 (individual) and 05-136348 (corporate).
2. On April 5, 2019, the Claimant and the Respondent entered into a contract to install a water management system in the basement of the Claimant's home (Contract). The Contract called for the interior installation of a high impact wall cove drain-core water management system, heavy duty submersible pump system, full wrap stairwell service, and containment. The Respondent also agreed to leave the premises in broom-swept condition.
3. The areas to be serviced in the basement included twenty-seven feet of the left wall and forty-two feet of the rear wall.
4. The Contract expressly did not include plumbing services.
5. To keep the cost of the Contract down, the Respondent suggested to the Claimant that it would be cheaper to purchase outside-the-Contract drainage pipes and connectors. The Claimant purchased the supplies from Lowe's in the amount of \$208.81.
6. The Contract contained the following cancellation language:

You the buyer may cancel this transaction anytime prior to midnight of the 5th business day from the date of this transaction. (7 days if 65 years or older). To cancel this transaction, mail or hand deliver a signed, dated written notice to the

company no later than midnight of 5/11/19.⁴ Customer may waive this right by initialing here ____.

Clmt. Ex. 1.

7. The Claimant initialed the waiver.
8. The original agreed-upon Contract price was \$7,355.00.
9. The Contract stated that work would begin and be completed within three to ninety days.⁵
10. The Respondent told the Claimant that before the work could begin, the Claimant was obligated to turn off the baseboard heat and water lines, which were located in the work zone in the basement.
11. A limited warranty was provided with the Contract. Contained on the back side of the limited warranty form, item number 3 also instructed the Claimant to remove any stored materials, paneling, or other obstructions to permit the work crew to access and service the area.
12. The Claimant signed the limited warranty form.
13. Five days after signing the Contract, on April 10, 2019, the Claimant contacted the Respondent and orally agreed to a start date of April 15, 2019.
14. On April 15, 2019, the Respondent called the Claimant to say that his work crew was unable to begin work due to a malfunction with the work truck. No work was performed on this date.
15. On April 16, 2019, at approximately 9:15 a.m., the work crew arrived at the Claimant's home to begin work. A crew member called the Respondent to report that no work

⁴ The Respondent erroneously wrote that the Claimant had until "5/11/19" to cancel the contract, as opposed to April 11, 2019 which was five business days from the signing of the Contract. See Clmt. Ex. 1.

⁵ Ninety days from April 15, 2019 was Sunday, July 14, 2019.

could be performed because the baseboard heat had not been disconnected. The work crew left the premises without performing any work.

16. At approximately 10:30 a.m., on the same date, the Respondent arrived at the Claimant's home. The Claimant and the Respondent had a contentious conversation about the baseboard heat and water lines. The Claimant believed that the Respondent's uncle, who is a plumber, would perform this work and that the cost was included in the Contract. The Respondent replied that the service was not expressly included in the Contract. An understanding was reached between the parties with the Claimant agreeing to hire a plumber to disconnect the baseboard heat and water lines before the work could begin. In turn, the Respondent orally offered to give the Claimant a \$500.00 credit on the Contract as a result of the miscommunication surrounding the necessity for a plumber.

17. Contemporaneously, the Claimant paid the Respondent \$2,452.00 as a down payment for the work to be performed under the Contract.⁶

18. On April 22, 2019, the Claimant called the Respondent to inform him that the issue with the baseboard heat and water lines had been resolved. The parties orally agreed to a new start date for the Contract to begin on April 29, 2019.

19. On April 29, 2019, the Respondent called and spoke to the Claimant's wife asking to move the start date to April 30, 2019. She agreed to the new start date.

20. On April 30, 2019, the Respondent's work crew arrived at the Claimant's home to begin work on the Contract. The Claimant, however, told the work crew to leave the premises and that he was finished dealing with the Respondent.

⁶ One-third of \$7,533.00 is \$2,451.67.

21. The Respondent immediately called the Claimant to ask why his work crew was being ordered off the job. The conversation devolved into a heated conversation with accusations being made about promises made and not kept by the Respondent. The Claimant also told the Respondent that he was cancelling the Contract by the cancellation date (May 11, 2019) and he wanted a refund for the down payment.

22. Thereafter, the Respondent repeatedly called the Claimant on April 30, 2019 in an effort to resolve whatever disagreement existed between the parties and to perform the Contract.

23. On one such occasion, the Claimant's wife answered the phone. She told the Respondent that her husband was cancelling the Contract citing the May 11, 2019 cancellation window.

24. On May 5, 2019, the Claimant mailed a letter via certified and regular mail to the Respondent, indicating the following:

I am writing this letter as per your contract, to inform you that as per our conversation on the phone on April 30, 2019 we are rescinding the transaction/agreement dated April 5, 2019 and no longer wish to do business with you. We are requesting our Deposit in the amount of \$2452.00 be refunded in full.

Clmt. Ex. 3.

25. The certified letter was returned to the Claimant as unclaimed, but the regular mailing was not returned.

26. On or about May 5, 2019, the Claimant emailed similar language to the Respondent via the Respondent's company website.

27. On May 6, 2019, the Claimant filed the Claim with the MHIC. As a basis for filing the Claim, the Claimant wrote:

Was to start work on 4/15/19 and did not show, showed up on 4/16/19 and refused to start job due to baseboard heat not disconnected and removed, which he stated

his family member would take care of it. Was scheduled to start work on 4/29/19 and did not show. We paid more than 1/3 of total amount of contract for deposit. We also had to purchase some supplies that per the contract the contractor would provide all supplies and materials to complete job. Informed [the Respondent] at Valco by phone that we were rescinding the contract and requested our deposit refunded.

Clmt. Ex. 4.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); 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.” 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”). “[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 not proven eligibility for compensation.

The Claimant testified that he cancelled the Contract because he no longer had confidence in the Respondent to perform work that had been agreed upon by them. The factors the Claimant cited that caused him to arrive at this conclusion included (1) the Respondent failing to appear on the first day of work (April 15, 2019); (2) the Respondent’s rude behavior during the April 16, 2019 meeting; (3) the Respondent changing the terms of the Contract by

making the Claimant pay for supplies at Lowe's; (4) the Respondent collecting more than one-third the contract price for the down payment; and (5) the Respondent not appearing on the rescheduled start date of April 29, 2019. The Claimant and his wife were also quite cross at the Respondent and his workers for opening a basement window and failing to close it afterwards.

The Claimant's wife's testimony mirrored her husband's testimony, but she added that she had to intervene between the two men during the April 16, 2019 argument because she could hear the Respondent getting "very irate" and "louder" with her husband and she was uncertain of the Respondent's temperament and she feared the situation might escalate beyond a verbal altercation.

The Claimant's wife also testified about her conversation with the Respondent that took place on April 30, 2019. She indicated that the Respondent "continued to call my husband numerous times a day" and many of the calls were picked up by the answering machine when neither she nor her husband answered the telephone. She then finally decided to answer the phone. She testified that she and the Respondent spoke about the window in the basement being opened by the work crew and not closed. According to the Claimant's wife, the Respondent believed she was accusing his work crew as doing something nefarious or being thieves. In any event, the Claimant's wife testified that the Respondent "begged" her to convince her husband to complete the job. The conversation ended with the Respondent becoming irate with her. On this point, she stated, "I was very calm but not okay with the situation. He was getting louder when speaking to me. I was not going to convince my husband to do the job." Finally, the Claimant's wife felt she was being harassed by the Respondent.

The Respondent testified that he had incurred costs associated with the Contract when the Contract was unilaterally cancelled by the Claimant. He stated that his work crew appeared at

the Claimant's home on April 30, 2019 to set up the work site and begin breaking ground when they were told to leave. The Respondent also disagreed with the Claimant's characterization about the cost for the drainage pipe supplies indicating that the Contract, as written, "constitutes the entire agreement between the Owner and the Contractor." Contr. Ex. 1. According to the Respondent, the cost of drainage pipe supplies was not expressly included in the description of work or the materials to be provided by him. Moreover, the Respondent testified that no addendum was ever agreed to or appended to the Contract.

While the Respondent agreed that he and the Claimant had words on April 16, 2019, he denied being upset or angry, although he acknowledged that the "volume did go up." Instead, the Respondent characterized his affect as being more disappointed by the things being said to him by the Claimant during their April 16 conversation. In any event, after the two men had words, the air was cleared and the Claimant paid the deposit for the work to begin after the base board and water lines had been disconnected. The Respondent also testified that he offered a \$500.00 credit toward the cost of the plumber because of the misunderstanding between him and the Claimant. Nevertheless, specific to this issue, the Respondent testified that the limited warranty documentation, signed by the Claimant, specifically placed the homeowner on notice that it was his responsibility to move obstructions away from the work site prior to the work being performed.

As to the timeline of events, the Respondent does not dispute that a company truck broke down preventing work to be performed on April 15, 2019. The Respondent also does not dispute that he cancelled at the last minute on April 29, 2019. However, the Respondent testified that he spoke to the Claimant's wife to reschedule the start date to April 30, 2019. The Respondent

believed their conversation was cordial and the Claimant's wife was agreeable to the date change.

There is no dispute between the parties that the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. There is no dispute that the Claimant cancelled the Contract prior to the Respondent performing any work under the Contract. There is no dispute that, upon learning of the cancellation, the Respondent called the Claimant multiple times to discuss the matter. The Respondent spoke to both the Claimant and the Claimant's wife on April 30, 2019, both telling the Respondent that the Claimant was exercising his right to cancel the Contract before the May 11, 2019 deadline. Therefore, the question becomes whether the Claimant is impeded from collecting from the Fund based on his unilateral cancellation of the Contract.

The Fund argued against an award from the Fund, and I agree, on the basis that the Claimant "unreasonably rejected good faith efforts by the contractor to resolve the claim." Bus. Reg. § 8-405(d) (2015 & Supp. 2020). Although the term "good faith" is not defined in the applicable regulation or statute, it generally refers to "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage." *Black's Law Dictionary* 836 (11th ed. 2019). Applying this standard, I find that the Respondent acted in good faith.

As to the cancellation provision in the policy, I found it curious that the Claimant did not press this point during his presentation before me. He mentioned in his correspondence with the MHIC that he believed he had until May 11, 2019 to cancel the Contract without impunity, but when the Respondent testified that the Claimant waived the cancellation option on page one of

the Contract, the Claimant never challenged the Respondent's interpretation of the Contract. This is key, because both the Claimant and his wife told the Respondent that the primary reason for cancelling the Contract was the cancellation option in the Contract. In fact, the Claimant's wife's testimony was unequivocal on this point. That the Claimant did not forcibly pursue this at the hearing strongly suggests to me, and it is more likely than not, he realized his reliance on this exit strategy from the Contract was faulty. Hence, the reason he failed to mention it in the five reasons for cancelling the Contract.

Similarly, the five reasons enunciated by the Claimant for cancelling the Contract are without merit. Though neither side focused on the start and end dates agreed to per the Contract, it bears mentioning that the parties explicitly agreed when the work would begin and end. As detailed in the presentation by both sides, the agreed upon start date was April 15, 2019, which fell within the parameters of the begin date for the project. Accordingly, the Respondent had ninety days, or until July 19, 2019, to finish the project.⁷ There is no dispute that the start date did not go according to plan and was postponed three times from April 15 to April 16 (due to vehicle breakdown), April 16 to April 29 (due to the plumber issue), and finally April 29 to April 30 (by agreement of the parties). Nevertheless, the begin date remained well within the parameters of the project per the Contract. So, this argument, also, fails.

The Claimant's position that he lost confidence in the Respondent because of his rude behavior during the April 16, 2019 meeting equally lacks credibility. The Claimant presented evidence to show that he paid the Respondent the down payment on April 16, 2019 after the two met. He also presented documentation to show that he spent \$208.81 at Lowe's for the drainage pipe to be installed on the exterior of the home after the two met on April 16. He further wrote

⁷ Ninety days from April 15, 2019 was Sunday, July 14, 2019.

in his correspondence to the MHIC that he hired a plumber to remove and cap off the heat and water lines in the basement. Further, the Claimant did not deny that he communicated to the Respondent when the issue with the baseboard heat and water lines had been resolved so that a new start date could be scheduled. In addition, neither the Claimant nor his wife offered any explanation for why it upset them that the new start date shifted from April 29 to April 30. There are several puzzle pieces missing from this picture, because no one disputes that the Claimant's wife spoke to the Respondent and agreed to the new date of April 30.

The Claimant's argument that he paid more than one-third the contract price is not an issue to be resolved before me. That said, I found the argument spurious, at best, as a reason to cancel the Contract. I have no idea how the Claimant construed the down payment of \$2,452.00 to be in excess of one-third of the contract price of \$7,355.00, and thus to warrant cancelling the Contract. The Claimant never explained what he believed the figure was supposed to be. On the other hand, I found the Respondent's testimony persuasive and supported by the record; he said "I do not work in pennies." When I did the math, one-third of \$7,355.00 is \$2,451.67. The difference between the two figures is literally: thirty-three cents.

Lastly, while the Claimant affirmatively believed that the Respondent changed the terms of the Contract midstream, the record does not support such a finding. During his testimony, the Respondent directed me to various bullet points from the Contract and the limited warranty to demonstrate that it was the obligation of the Claimant to move the heating and water lines before work could begin (*see* #3 on the back side of the limited warranty) and plumbing was explicitly not included (*see* Terms and Conditions #2 on the back side of the Contract). Clmt. Ex. 1; Contr. Exs. 1 and 2. As to the Lowe's expense, the Respondent's explanation made sense and was

credible that he offered the Claimant the opportunity to save some money by purchasing the drain pipes as opposed to including the cost in the Contract.

Having analyzed the Claimant's premise for the cancellation and finding a lack of credibility for the reasons proffered, I will now turn to whether the Respondent made a good faith effort to resolve the conflict. There is no dispute between the parties that the Respondent called the Claimant "numerous times" on April 30, 2019. The Respondent explained in his letter to the MHIC that he immediately called and spoke to the Claimant. *See*, Clmt. Ex. 6; Contr. Ex. 1. This is confirmed by the Claimant in his letter to the MHIC too. *See*, Clmt. Ex. 5. During that conversation, it was the Respondent's belief that the issue stemmed from the use of an electric rotary hammer as opposed to the list of issues the Claimant reported to the MHIC and testified to as the basis for the unilateral cancellation of the contract. In any event, both sides agree that the Claimant also expressed that he was exercising the cancellation option. The Claimant's wife confirmed that afterwards the Respondent's calls went directly to the answering machine because neither she nor her husband wanted to answer the telephone. The Claimant's wife also confirmed during her testimony that the Respondent wanted to continue with the job and begged her to convince the Claimant to reconsider his position of cancelling the contract. After the phone call, according to both the Claimant and his wife, the Respondent continued to call their home. They simply ignored the phone.

So, I find it more likely than not that the Claimant unjustifiably refused all overtures by the Respondent to resolve what led to the cancellation of the contract by simply ignoring his calls. Five days later, the Claimant sent a letter to the Respondent cancelling the Contract and the very next day he hired a new company to perform the work. Because the Respondent had ample time to begin and complete the project under the Contract, the quickness in the Claimant's

action to hire someone else without attempting to resolve his differences with the Respondent speaks volumes about the Claimant's intention to shut down that avenue of opportunity. Therefore, the Claimant is not entitled to an award by the Fund. Bus. Reg. § 8-405(d) (2015 & Supp. 2020).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts or omissions. I further find that the Claimant unreasonably rejected good faith efforts on the part of the Respondent to resolve his claim and is not entitled to an award from the Maryland Home Improvement Commission Guaranty Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405, 8-405(d) (2015 & Supp. 2020).

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.

October 8, 2020
Date Decision Issued

CONFIDENTIAL
Kathleen A. Chapman
Administrative Law Judge

KAC/da
#186893v1A

PROPOSED ORDER

WHEREFORE, this 1st day of December, 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**