

<p>IN THE MATTER OF THE CLAIM</p> <p>OF DOROTHY S. DONOVAN,</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 THOMAS SHRUM,</p> <p>T/A SHRUM CONSTRUCTION, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE RACHAEL BARNETT,</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-02-14-18707</p> <p>* MHIC No.: 14(05)301</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On January 6, 2014, Dorothy S. Donovan (Claimant) filed a claim (Complaint) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$32,000.00 in alleged actual loss suffered as a result of a home improvement contract with Thomas Shrum, trading as Shrum Construction, LLC (Respondent).

I held a hearing on December 4, 2014 at the main offices of the Office of Administrative Hearings, located at 11101 Gilroy Road, Hunt Valley, MD 21031. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2010 and Supp. 2014). Hope Sachs, Assistant Attorney General,

Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented herself. The Respondent was not present.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 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 - Inspection report, November 12, 2013
- Clmt. Ex. 2 - Color photographs of the Claimant's bathroom, November 1, 2013
- Clmt. Ex. 3 - Respondent's Construction Proposal, February 27, 2013
- Clmt. Ex. 4 - Color photographs of the Claimant's bathroom, undated
- Clmt. Ex. 5 - Written statement from Claimant, undated

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

- Fund Ex. 1 - Notice of Hearing (October 17, 2014) & Hearing Order (May 2, 2014)
- Fund Ex. 2 - Licensure information, December 1, 2014
- Fund Ex. 3 - Letter from MHIC to Respondent (dated January 30, 2014) and attached claim (dated December 21, 2013)

I did not admit any exhibits on the Respondent's behalf.

Testimony

The Claimant testified and presented the testimony of her daughter, Mary O'Hern.

The Respondent was not present and therefore did not testify.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

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

1. As of the date of the hearing, the Claimant was 83 years old. (Test. O'Hern).
2. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 129752. (Fund Ex. 2).
3. On or about February 27, 2013, the Claimant and the Respondent entered into a contract to renovate a first floor bathroom and convert it from a powder room to a full bathroom. The Claimant wanted to renovate the bathroom to make it handicapped accessible for her husband, who was wheelchair bound. The contract stated that work would be performed in a "timely and professional manner according to industry standards." The contract did not provide a specific start date. (Clmt. Ex. 3).
4. The Respondent gave the Claimant the following written proposal:
 - a. Demo existing ½ bath, including office closet and wall(s)
 - b. Frame new walls
 - c. Move existing ductwork
 - d. Demo existing flooring tile, wood and sub floor
 - e. "Rough-in" new water and waste lines for new toilet, vanity and shower location
 - f. Furnish and install 2 new pocket doors to new bathroom
 - g. Furnish and install drywall on newly framed walls
 - h. Tape, finish and sand all new drywall work
 - i. Make floor alternations as needed for new tile and barrier-free shower
 - j. Furnish and install new cement based baker board for shower and surround tile
 - k. Furnish and install new tile ready shower pan
 - l. Furnish and install new floor, shower surround and wall tile
 - m. Furnish and install new glass shower walls and door(s)
 - n. Furnish and install new double showerhead with 1 hand held showerhead on hose
 - o. Furnish and install grab bars throughout bathroom and shower as needed
 - p. Furnish and install new lighting
 - q. Furnish and install new sink/vanity
 - r. Paint walls and ceiling, doors and trim

- s. Dispose of construction debris
- t. Clean entire work area

(Clmt. Ex. 3).

5. The proposal operated as the contract upon the Claimant's payment of \$5,000 to the Respondent to begin work. (Test. Clmt.).
6. The original agreed-upon contract price was \$15,000.00. (Clmt. Ex. 3). Respondent estimated that the work would take approximately one month. (Test. O'Hern).
7. At or around the time when the contract was made, the Claimant decided to purchase the bathroom tiles instead of having the Respondent furnish the tiles.
8. The work began in March 2013. (Test. Clmt. & O'Hern).
9. On dates unknown, the Respondent asked the Claimant for additional funds beyond the contract price. The Claimant made the requested payments. (Test. Clmt.).
10. The Claimant paid the Respondent upon request, a total of \$24,000.00. The Claimant also paid separate businesses approximately \$7,000.00 for fixtures and \$2,600.00 for tile. (Test. Clmt.).
11. In July 2013, the Claimant's husband entered hospice care. The Respondent was still working on the bathroom. (Test. O'Hern).
12. In August 2013, approximately five months after the work began, the Respondent and his employees partially completed the bathroom and left the job. (Test. O'Hern and Clmt.).
13. The finished product included the following defects: improperly laid tile, uneven walls, disparate coloration of ceramic tile joints and grout, the ceiling fan does not vent to the exterior, missing door hardware, missing trim, improperly installed plumbing, unlevelled flooring, missing ductwork to the bathroom for heating and cooling, and improper

electrical installation. Also, a wheelchair could not fit into the bathroom, because the door was not properly installed, and the Respondent did not install the glass door that was necessary for the shower area to be wheelchair accessible. (Clmt. Exs. 1 and 2).

14. On dates unknown, the Claimant and her family attempted to contact the Respondent to remedy the issues with the bathroom; however, they were initially unsuccessful because the Respondent would not answer the phone. (Test. Clmt. and O'Hern).

15. On a date unknown, an employee of one of Claimant's family members was able to reach the Respondent's wife via telephone. Following this contact, the Respondent sent an employee to the Claimant's home to hookup the water for the sink. (Test. O'Hern)

16. To date, the bathroom renovation remains incomplete, and the listed defects have never been corrected. (Test. Clmt. and Clmt. Ex. 1).

17. On November 12, 2013, Russell W. Allen, President, AA Home Inspection Service, Inc. (inspector), conducted an inspection of the Claimant's bathroom and located numerous incomplete and unworkmanlike items.

18. Mr. Allen estimated that the cost of reconstructing the bathroom would be \$28,944.00. (Clmt. Ex. 1).

DISCUSSION

I. The Respondent's failure to appear

Section 8-312(a) of the Business Regulation Article provides that the MHIC shall give the person against whom the action is contemplated an opportunity for a hearing. Md. Code Ann., Bus. Reg. § 8-312(a) (2010). On October 17, 2014, the OAH sent the Respondent a Notice of Hearing to the Respondent's address, 1021 Stewart Lane, Glen Burnie, Maryland 21060, the address on the Contract between the Claimant and the Respondent and the address on file with

the MHIC - by certified and regular mail. The OAH file contains certified mail, signed by the Respondent, with an October 18, 2014 delivery date.

A hearing was scheduled on December 4, 2014, at 9:30 a.m.; however, the Respondent failed to appear for the hearing. "If, after due notice, the person against whom the action is contemplated does not appear ... the [MHIC] may hear and determine the matter." Under Md. Code Ann., Bus. Reg. § 8-312(h) (2010).

Based upon the record before me, I am satisfied that the Respondent was properly notified of the date, time and location of the scheduled hearing in this matter. The hearing was convened as scheduled on December 4, 2014 at which time neither the Respondent nor anyone authorized to represent him appeared and, therefore, the hearing proceeded in the Respondent's absence.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. There are no statutory impediments barring the Claimant from recovering from the Fund. She is not related to the Respondent and does not work for him. She does not have a pending insurance claim or court case against him, she owns the residence that is the subject of her claim and does not own more than three properties. Md. Code Ann., Bus. Reg. § 8-405(f)(2)(ii).

II. Merits of the Case

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) (Supp. 2014). *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."

Md. Code Ann., Bus. Reg. § 8-401 (2010). The Claimant bears the burden of proof by a preponderance of the evidence to show entitlement to an award from the Fund. COMAR 09.08.03.03A(3). 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. The Claimant did not provide a signed contract at the hearing; however, she provided a proposal from the Respondent and her and her daughter's testimony supported the conclusion that the proposal was memorialized when the Claimant wrote a check in the amount of \$5,000.00 to the Respondent to begin the work.

The Claimant testified consistently with the photographs taken of her bathroom and the inspection report; therefore, I found her credible. The Claimant testified that she had the Respondent do work for her in the past and trusted him renovate her bathroom so her ailing husband would have a place to bathe. The Claimant asserts that the Respondent performed unworkmanlike, inadequate or incomplete home improvements in the renovation of the Claimant's powder room into a wheelchair-accessible full bathroom. The Claimant testified that she accepted the proposal, made a down payment and entered a contract with the Respondent to have her powder room expanded and converted into a handicap-accessible full bathroom so that her ailing husband would have a place to bathe properly in their home while he was restricted to the first floor. The Claimant explained that due to her husband's medical situation, no one was available in the home to monitor the progress of the bathroom renovation.

Regarding the payment for work performed, the Claimant did not bring canceled checks with her to the hearing to document the exact dates and payments she made to the Respondent; however, she recalled that she paid the Respondent \$24,000.00 total, including \$5,000.00 to start

the job. She explained that she exceeded the original contract estimate, because the Respondent kept asking her for more money. The Claimant also explained that she paid \$2,600.00 for tile and \$7,000.00 for fixtures. The Claimant testified that after the Respondent abandoned the job, the Claimant attempted to reach him to remedy the problems, but he did not return her phone calls.

The Claimant's daughter, Mary O'Hern, testified credibly and out of genuine concern for the Claimant that the Respondent took advantage of her 83-year-old mother, knowing that she was desperate to get the bathroom finished for her husband to use (due to his confinement to the first floor of the home). Ms. O'Hern explained that although the bathroom was not finished for her father's to use, the family would like the bathroom completed so that her mother can use it.

The Claimant also presented a detailed home inspection report. (Clmt. #1). The report is based on a November 1, 2013 inspection of the bathroom constructed by the Respondent. Along with the written report, the Claimant presented color photographs taken of the bathroom during the inspection. (Clmt. #2) The inspection report documented numerous flaws with the bathroom, each of which corresponds to a particular photograph and some of which are repetitious where the same flaw exists in multiple areas of the bathroom. Mr. Allen's report documented the following flaws:

- a. The threshold and weather stripping were removed on the rear door and never re-installed. Thresholds at doorway should be ½ inch in height.
- b. There is excessive lippage¹ of adjoining ceramic tile.
- c. The alignment of the ceramic tile patterns is greater than ¼ inch and is considered excessive.
- d. The tile patterns and seams are out of plumb and not properly aligned. The wall tile shows a one-inch variance in placement at the corners. The walls are out of plumb one inch more or less in eight feet.

¹ Lippage is defined as "variation in the height of adjoining tiles." Tile Council of North America, Inc. www.tcnatile.com/faqs/175-lippage.html

- e. The alignment of the tile joints vary and are not set into a pattern.
- f. The edge of the shower wall is out of plumb 3/8" in six feet more or less.
- g. Walls are greater than 1/2" out of line in eight feet.
- h. There are color variations in the ceramic tile joints.
- i. The tile patterns are out of level and not aligned. They are sagging 1/2" in three feet.
- j. The ceiling fan/light/exhaust vent is not vented to the exterior.
- k. Hardware (handle) on the pocket door is missing.
- l. The bottom of the pocket door is damaged.
- m. Pocket door hardware is missing (striker plates, etc.).
- n. The corner trim is missing. The base trim is missing on the wall behind the water closet. Handicapped railings are missing on the walls.
- o. The grout between tiles is not a uniform color. This is readily visible from a distance of six feet.
- p. The floor tile is not aligned properly. There are cracks in the grouting of the floor tile joints due to inadequate bracing and support.
- q. All plumbing under the wash basin should be insulated and have proper knee clearance for accessibility.
- r. The wall around the replacement door frame to the bathroom has not been repaired or painted.
- s. The floor is not level where the cabinets were installed. The trim was not completed.
- t. The walls above the door frame require repair and the tile lippage exceeds 1/16".
- u. The trim is missing on the wood paneling behind the bathroom wall. Install proper trim on the flooring where it joins the paneled walls.
- v. Repair the loose paneling and install proper corner trim. The base trim is missing.
- w. The electrical boxes in the walls constructed of wood or other combustible material should be flush with the finished surface. Install face plates on the light switches for safety.
- x. Luminaires should not be installed close to combustible material. They are not an UL approved fixture for combustible location.
- y. Draft stopping is needed in the openings between the floors to cut off all concealed draft openings to form an effective fire blocking.
- z. Extend ductwork to the bathroom for heating and cooling.
- aa. Add proper support to new plumbing for the bathroom.
- bb. Each disconnecting means must be legibly marked to indicate its purpose on the electrical panel box.
- cc. The cable should be secured within twelve inches of the point where the cable enters the electrical panel box.
- dd. The cable should be secured within twelve inches of the point where the cable enters the electrical panel box.
- ee. Bends and twisting of cable should be made such that the cable is not damaged.

- ff. There were no permits for electrical, plumbing, heating and construction of the bathroom as per Baltimore County Building Code (Section R105.1 Required, R105.2.2 Repairs, R105.8 Responsibility, R109.4 Approval Required, R113 Violations, R114 Stop Work Order).

(Clmt. #1)

The inspector recommended that the new bathroom be rebuilt and reconstructed as per the contract with the Respondent with proper permits and inspections. The inspector estimated that the cost of doing so would be \$28,944.00. (Clmt. #1)

The Fund did not present any evidence. The Fund acknowledged in concluding remarks that the case was legally sufficient and this was a clear case of poor workmanship, based on the credible inspection report in evidence. I agree. I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case.

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. COMAR 09.08.03.03B(3)(c).

The Claimant paid \$33,600.00 to and on behalf of the Respondent (\$24,000.00 paid to Respondent,² plus \$7,000.00 for fixtures and \$2,600.00 for tile). The inspector estimated that the cost to rebuild the bathroom would be \$28,944.00. Therefore, I calculate the Claimant's actual loss as follows:

Amount paid to or on behalf of Respondent	\$33,600.00
Amount to Correct	<u>+28,944.00</u>
	\$62,544.00
Less Original Contract price	- ,33,600.00
Total	\$28,944.00

Pursuant to the Business Regulation Article, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md. Code Ann., Bus. Reg. § 8-405 (e)(1), (5) (Supp. 2014).

The actual loss computed above is \$28,944.00 which exceeds \$20,000.00 by \$8,944.00. Accordingly, the Claimant is entitled to reimbursement from the Fund of only a portion of her actual loss, or \$20,000.00. Md. Code Ann., Bus. Reg. § 8-405 (e)(1) (Supp. 2014).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405 (2010 & Supp. 2014).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; and

² The original contract price was \$15,000.00; however, the Claimant's additional payments to the Respondent totaled \$9,000.00 and therefore became part of the contract price. Also added in is the additional \$9,600.00 that the Claimant paid on behalf of the Respondent for tile and fixtures that were part of the original contract.

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 at least ten percent (10%) as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

January 27, 2015
Date Decision Issued

Rachael Barnett
Administrative Law Judge

RAB/lh
153779

PROPOSED ORDER

WHEREFORE, this 2nd day of March 2015, 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.

Marilyn Jumalon

***Marilyn Jumalon
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION