

IN THE MATTER OF THE CLAIM	* BEFORE JOY L. PHILLIPS,
OF SARAH CLARK,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	* OAH No.: DLR-HIC-02-16-21307
OMISSIONS OF JASON SMUCKER,	* MHIC No.: 15 (05) 1085
T/A JLS DESIGN LTD,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On June 4, 2015, Sarah Clark (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$10,000.00 in alleged actual losses suffered as a result of a home improvement contract with Jason Smucker, trading as JLS Design LTD (Respondent).

I held a hearing on November 30, 2016 at the Kent County Courthouse, Chestertown, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). R. Stewart Barroll, Esquire, represented the Claimant, who was present. Eric B. London, Assistant Attorney General,

Department of Labor, Licensing and Regulation (Department), represented the Fund. 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 Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); 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 that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Cl. Exs. 1 through 5 - Photographs of retaining wall
- Cl. Ex. 6 - Proposal from the Respondent, September 2, 2014
- Cl. Ex. 7 - Email exchange between Jane Kirby and Beth Dunn, September 9, 2014 and November 16, 2014
- Cl. Ex. 8 - Email from the Respondent to the Claimant with contract and attachments, September 16, 2014
- Cl. Ex. 9 - Email exchange between Jane Kirby and the Claimant, with attachments, September 26, 2014
- Cl. Ex. 10 - Email exchange between the Claimant and Beth Dunn, October 6, 2014 to October 20, 2014, with copy of cancelled check
- Cl. Ex. 11 - Email exchange between the Claimant and Beth Dunn, October 22, 2014 to November 13, 2014
- Cl. Ex. 12 - Email exchange between the Claimant and Beth Dunn, September 16, 2014 and January 12, 2015
- Cl. Ex. 13 - Email exchange between the Claimant and Beth Dunn, September 16, 2014 and March 5, 2015

The Respondent submitted no exhibits to be admitted into evidence.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Notice of Hearing, August 31, 2016
- Fund Ex. 2 - Hearing Order, June 21, 2016
- Fund Ex. 3 - Respondent Licensing History, 2008 to present
- Fund Ex. 4 - Claim Form, received June 4, 2015
- Fund Ex. 5 - Letter from Keyonna Penick, MHIC, to the Claimant, June 21, 2016
- Fund Ex. 6 - List of Registered Marine Contractors as of October 19, 2015
- Fund Ex. 7 - Licensing FAQs for Applicants-HIC, printed November 28, 2016

Testimony

The Claimant testified on her own behalf.

The Respondent testified on his own behalf.

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 98053. Using that MHIC license number, the Respondent operated JLS Design, and Chester River Docks, a marine contracting business.
2. On October 17, 2014, the Claimant and the Respondent, doing business as Chester River Docks, entered into a contract to replace a failing retaining wall on the Claimant's home property. The contract called for the Respondent to install pilings, walers and boards, filter cloth, drains, tie backs, and tie back rods. The work included removing stumps in the existing retaining wall, collapsing the existing wall, filling the space in with dirt, and seeding disturbed areas. The work was to begin in October 2014 and would take approximately two weeks to complete.
3. The original agreed-upon contract price was \$22,800.00.

4. On October 17, 2014, the Claimant paid the Respondent \$10,000.00.
5. The Respondent never started the agreed-upon work.
6. On November 12, 2014, the Claimant emailed the Respondent to inquire about a start date. The Respondent's general manager, Beth Dunn, wrote that they were waiting for a permit. Ms. Dunn was the general manager for both JLS Design and Chester River Docks.
7. On January 9, 2015, the Claimant again emailed the Respondent to inquire about a start date. Ms. Dunn wrote that the Claimant's job was the next in line.
8. On March 5, 2015, the Claimant again emailed the Respondent to inquire about a start date. Neither Ms. Dunn nor the Respondent replied.
9. At the end of March 2015, the Claimant went to the address listed for the Respondent's businesses and saw a locked office with no lights, no furniture, no equipment, and boxes on the floor. The Claimant called the Respondent, who told her she needed to contact Beth Dunn. The Claimant was unable to reach Ms. Dunn.
10. The Respondent abandoned the contracted work. The Claimant has not contracted with any other company to do the work.
11. The Claimant's actual loss is \$10,000.00.

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 (3rd 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) (“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 he entered into the contract with the Claimant. Simultaneously, he owned and operated a marine contracting firm. At some point, the State of Maryland required marine contracting firms to obtain a marine contractor license, but until that system is implemented, marine contractors are still required to maintain an MHIC license. (Fund Ex. 7.) The Respondent testified that he had maintained his MHIC license for many years and, during that time, had used the license to enter into and receive permits for approximately forty marine contracting jobs in Kent County, Maryland. He confirmed that he intended to use his MHIC license to complete the Claimant’s contract. Accordingly, I find the Respondent was operating under his MHIC license when he, operating as Chester River Docks, entered into a contract with the Claimant.

The Respondent agreed to replace a failing retaining wall on the Claimant’s home property. The contract called for the Respondent to install pilings, walers and boards, filter cloth, drains, tie backs, and tie back rods. The work included removing stumps in the existing

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

retaining wall, collapsing the existing wall, filling the space in with dirt, and seeding disturbed areas. The work was to begin in October 2014 and would take approximately two weeks to complete. The Claimant paid the Respondent \$10,000.00 as a down payment.

Despite repeated emails from the Claimant to the Respondent and his general manager, and a personal visit to the Respondent's office, which turned out to have been deserted, with only some boxes still present, the Respondent never conducted any work on the property. The Respondent's general manager, Beth Dunn, emailed the Claimant in November 2014 that the Respondent was waiting for permits. In January, Ms. Dunn wrote to tell the Claimant that her job was the next to be done. When the Claimant emailed her again, in March 2015, Ms. Dunn did not reply at all. The Claimant reached the Respondent personally once by telephone, but the Respondent told her to call the general manager. The Claimant was never able to reach her by telephone.

The Respondent testified, but he did not offer any explanation for why he abandoned the job, other than to say that around February or March 2015, he was no longer a partner in JLS Design, although the company operates out of his home.

The Respondent never performed any work on the property, effectively abandoning the job. Further, he has never repaid the Claimant her down payment. 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 abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

COMAR 09.08.03.03B(3)(a).

In this case, the contractor abandoned the contract without doing any work. Accordingly, the Claimant is entitled to reimbursement from the Fund in the amount of \$10,000.00, the amount paid to the Respondent under the contract. *Id.* § 8-405(e)(5); COMAR 09.08.03.03B(3)(a).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$10,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$10,000.00; 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 Commission;² and

² See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

Signature on File

February 13, 2017
Date Decision Issued

Joy L. Phillips
Administrative Law Judge *by MDO*

JLP/dlm
#166493

PROPOSED ORDER

WHEREFORE, this 10th day of April, 2017, 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