

<p>IN THE MATTER OF THE CLAIM</p> <p>OF DEBRA A. BATTISTA,</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 JAMES J. MARTIN,</p> <p>T/A PROMPT RESTORATION, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE NANCY E. PAIGE,</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-02-16-29327</p> <p>* MHIC No.: 16 (90) 1226</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On June 8, 2016, Debra B. Battista (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$359,954.00 in alleged actual losses suffered as a result of a home improvement contract with James J. Martin, trading as Prompt Restoration, Inc. (Respondent).

I held a hearing on April 26, 2017 at the Office of Administrative Hearings (OAH), 10400 Connecticut Avenue, Kensington, Maryland.¹ Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). Rene Sandler, Esquire, represented the Claimant, who was present. Hope Sachs,

¹ The hearing was originally scheduled for January 23, 2017, but postponed at the Claimant's request. I kept the record open for ten days to permit the Claimant to submit additional documentation of her loss.

Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting fifteen minutes for the Respondent or someone to represent him, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.²

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. 2016); 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. # 1. June 9, 2015 Agreement Between Owner and Contractor
- Cl. # 2. October 28, 2015 additional contract documents
- Cl. # 3. January 29, 2016 Detailed itemization of contract work
- Cl. # 4. A-I. Photographs
- Cl. # 5. Undated letter from Claudio Martin, T/A Beaver Land, LLC, to René Sandler, with attached contract proposal
- Cl. # 6. Receipts, cancelled checks and other documentation of payments to Beaver Land, LLC and others for repair and reconstruction of Claimant's home
- Cl. # 7. A-G. Photographs

² Notice of the hearing was mailed to the Respondent at his address of record by certified mail on February 8, 2017, COMAR 09.08.03.03A(2), and returned unclaimed.

- Cl. # 8. December 22, 2015 letter from Joseph F. Toomey to Claimant Re: Turret
- Cl. # 9. December 22, 2015 letter from Joseph F. Toomey to Claimant Re: Restoration work
- Cl. # 10. May 19, 2015 Building Permit Notice
- Cl. # 11. May 2, 2017 fax transmittal to ALJ with attachment³

The Respondent did not appear and did not submit any exhibits for admission.

I admitted the following exhibits on behalf of the Fund:

- GF # 1. April 10, 2017 memorandum from Linda Bailey, Docket Specialist, to Legal Services
- GF # 2. April 4, 2016 Motor Vehicle Administration Driving Record Information for Respondent
- GF # 3. DLR licensing history for Respondent
- GF # 4. July 7, 2016 letter from Kevin Niebuhr, Investigator, MHIC, to Respondent

Testimony

The Claimant testified in her own behalf and presented the testimony of Joseph Toomey, accepted as an expert in home inspection; Mark Kramer, accepted as an expert in architecture; and Claudio Martin.

The Fund did not offer any 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 0100702.

³ I kept the record open ten days to allow the Claimant time to provide additional documentation of payments to the Respondent. This document was timely received, with a copy to Hope Sachs, Esquire. Ms. Sachs did not object to its admission.

2. On November 3, 2015, the Claimant and the Respondent entered into a written contract to repair major fire damage to the Claimant's home. Prior to the execution of the contract, the parties reached an informal agreement and the Respondent began work in October 2015.

3. The original agreed-upon contract price was \$251,827.38.

4. The Respondent performed work pursuant to the contract between October and November 19, 2015. The Respondent then abandoned the job.

5. The Respondent submitted plans to Montgomery County for another house in order to secure permits for work on the Claimant's home. The only plans submitted for the Respondent's house were for a bay window. The Claimant paid a total of \$26,233.71 for new plans and construction drawings and new permit fees after the Respondent abandoned the job.

6. The Claimant's home has a round turret with a conical roof that was severely damaged in the fire. The Respondent performed some work on the turret, which was completely unworkmanlike in that the shingles were applied without following the conical shape of the roof and the repairs were not structurally sound. The repairs were also incomplete.

7. After the Respondent abandoned the job, the home sustained substantial additional damage, including damage to floors and burst pipes and radiators, because it was not protected from the elements and it was not winterized. Much of the work done by the Respondent was destroyed by the weather.

8. The Respondent also left large amounts of debris strewn around the Claimant's property.

9. The Claimant subsequently retained Beaver Land, LLC, to complete the job and repair the work and additional damage done by the Respondent. The total contract price was

\$290,000, but included at least \$20,350 for work that was not part of the Claimant's contract with the Respondent.

10. The work performed by the Respondent amounted to no more than ten percent of the work covered by his contract.

11. Beaver Land removed and redid all of the work done by the Respondent because it was unworkmanlike or damaged by the elements.

12. The Claimant paid the Respondent \$62,956.84.⁴

13. The Claimant's actual loss is at least \$20,000.00.

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).⁵ "[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);⁶ *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."

⁴ Payments to the Respondent were made by the Claimant's insurance carrier pursuant to the terms of her policy.

⁵ As noted above, "COMAR" refers to the Code of Maryland Regulations.

⁶ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

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. As discussed below, the Respondent performed unworkmanlike, inadequate and incomplete home improvements.

On or about March 9, 2015, the Claimant's home, which is approximately one hundred years old, was seriously damaged by a major fire. The parties entered into an agreement for repair and restoration of the home at a total cost of \$251,827.38.⁷

The Respondent performed some work pursuant to the contract between October and November 2015, including an attempt to reconstruct a round turret at the front corner of the house. Joseph F. Toomey, a licensed architect who inspected the job on December 21, 2015, submitted two reports detailing the scope of his inspection and testified as an expert for the Claimant. He concluded that the reconstruction of the turret was seriously deficient. The reconstruction did not follow the shape of the original, the partially replaced shingles did not follow the conical shape of the roof and the structural attachment of the turret roof rafters was inadequate.

Mr. Toomey also concluded that the permit plans submitted by the Respondent were faulty with respect to structural changes to the dining room and that the construction of an addition to the dining room had covered parts of the electrical system, which needed to be relocated. He recommended that work be stopped, except for protection of the house against the

⁷ The Claimant submitted a signed two-page document dated June 9, 2015, Cl. #1, reflecting the contract price, but with no details as to the scope of the work. The Claimant denies signing that document, but identifies a document dated November 3, 2015, Cl. #2, as the contract between the parties. The price is the same, but the scope of work, in great detail is set forth in a third document, Cl. #3, which carries a January 29, 2016 date. The date of the contract is not material. The price is consistent on all three documents and, since the Respondent did not appear, and the Fund did not challenge the scope of the work, there is no dispute in this regard.

elements, until proper plans were developed, including plans to replace the turret in accordance with the original design of the house.

Mr. Toomey also reported that flooring in various parts of the house had been damaged by water and construction activity and would have to be replaced. He could not identify the source of the water. He also noted that debris was strewn around the property.

Mark Kramer, a licensed architect, testified that the permit plans submitted by the Respondent for the Claimant's home were for a different house and a different property. The only plans submitted by the Respondent for the Claimant's home were for a bay window. Mr. Kramer prepared plans, created a scope of work document and prepared construction documents. The Claimant paid him a total of \$26,233.71 for the work necessary to secure permits (including permit fees) and to secure bids for the necessary work.

Claudio Martin, the owner of Beaver Land, testified that he completed the work, including reconstructing the turret, in accordance with Mr. Kramer's plans. He testified that he had to remove the Respondent's work and rebuild the turret, and that he had to remove and redo all of the Respondent's work because it was unworkmanlike. In a report submitted in evidence, he wrote that the Respondent had completed about ten per cent of his contract, but that all that was done was ruined by rain.

Based upon the testimony and reports of Mr. Toomey and Claudio Martin, I find that the work performed by the Respondent was unworkmanlike and inadequate. Based upon the testimony of Mr. Kramer, I find that the failure of the Respondent to use appropriate plans to support the permit application and to guide the repair and reconstruction contributed to the Respondent's unworkmanlike and inadequate home improvement and that the preparation of such plans was necessary in order to correct those deficiencies. 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).

Consequential damages have been defined as losses "that do not flow directly and immediately from an injurious act, but that result indirectly from the act." *Black's Law Dictionary*, 416 (8th ed. 2004); see also *Hadley v. Baxendale*, 156 ER 145 (1854). It is impossible, based upon the evidence, to separate consequential damage, resulting from ongoing exposure of the interior of the house to the elements, from the deficiencies in the Respondent's performance. It is also impossible to determine from the Beaver Land contract which parts of the work, if any, are related to repair of consequential damage as opposed to repair of deficiencies in the Respondent's work and completion of the Respondent's contract.

The Claimant paid \$62,484.66 to the Respondent through her insurance carrier.⁸ She ultimately entered into a contract with Beaver Land, LLC, to complete the repair and reconstruction of her home. The total price of that contract was \$290,000.00. The Claimant testified, however, that the Beaver Land contract included \$20,350.00 for site restoration that was not part of her contract with the Respondent.⁹ That amount must therefore be deducted from the Beaver Land contract price. She stated that her net loss was \$72,974.97, but did not explain how she calculated that amount.

MHIC's regulations provide the following three formulas for measurement of a claimant's actual loss:

⁸ Counsel for MHIC stated in closing that insurance coverage was not relevant to the Claimant's entitlement to recovery from the Fund. There are no provisions in the statute or regulations regarding such collateral coverage. I have therefore not considered the Claimant's insurance coverage in resolving her claim against the Fund.

⁹ The Claimant actually produced checks to Beaver Land totaling \$278,000.00, plus the \$20,350.00 for site restoration. Because, as discussed below, I will not calculate the Claimant's loss on the basis of her payments to Beaver Land, there is no need to resolve this discrepancy.

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(a) 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.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) 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).

Claudio Martin testified that he had to remove and replace all of the work done by the Respondent. Both he and Mr. Toomey reported that the Respondent left no materials at the site. I therefore conclude that the work done by the Respondent was of no value to the Claimant. Because it is not possible to separate the cost of repairing consequential damage from the amounts paid to Beaver Land. It is also impossible to compare the scope of the work under the Beaver Land contract with the scope of the work under the Respondent's contract. The formats of the two documents are different and the itemized details are different. As discussed above, the work under the two contracts was not governed by the same set of plans. I find, therefore, that the most appropriate measure of the Claimant's damage is the amount she paid to the Respondent, \$62,956.84.

Pursuant to the applicable law, 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) (2015). Accordingly, the Claimant is entitled to reimbursement from the Fund of only a portion of her actual loss, or \$20,000.00. *Id.* § 8-405(e)(1).¹⁰

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, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

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

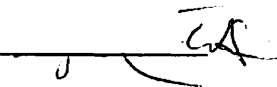
ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;¹¹ and

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

Signature on File

July 20, 2017
Date Decision Issued

NEP/emh
168114



Nancy E. Paige
Administrative Law Judge

¹⁰ Even if I were to find that there was some value to the Claimant of work or materials provided by the Respondent, based upon the testimony of Claudio Martin, only ten percent of contract was completed, which would amount to about \$25,000.00, which is about \$40,00.00 less than the payments the Respondent received. The Claimant also paid \$26,233.71 for architectural services which is probably includable in her actual loss, and exceeds her allowable recovery from the Fund.

¹¹ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 21st day of August, 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.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION