

IN THE MATTER OF THE CLAIM	* BEFORE NEILE S. FRIEDMAN,
OF ANOZIE ONYEMAECHE AND	* AN ADMINISTRATIVE LAW JUDGE
PAULINE ONYEMAECHE,	* OF THE MARYLAND OFFICE
CLAIMANTS	* OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	* OAH No.: DLR-HIC-02-16-25410
IMPROVEMENT GUARANTY FUND	* MHIC No.: 16 (90) 1258
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF NIXON ELVIR,	*
T/A MASTER GENERAL HOME	*
IMPROVEMENTS, INC.,	*
RESPONDENT	*

\* \* \* \* \*

**PROPOSED DECISION**

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**STATEMENT OF THE CASE**

On July 27, 2016, Anozie Onyemaechi (Claimant) filed a claim (Claim)<sup>1</sup> with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement

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<sup>1</sup> At the start of the hearing in this case, the Claimant moved to amend the claim to add, as an additional claimant, Pauline Onyemaechi (collectively, the Claimants), his wife and the co-owner of the home at which the home improvement in this case was conducted. Because the amendment did not prejudice the contractor whose conduct gave rise to the claim, I allowed it. Code of Maryland Regulations (COMAR) 09.08.03.02.

for alleged actual losses suffered as a result of a home improvement contract (Contract) with Nixon Elvir, trading as Master General Home Improvements, Inc. (Respondent).

I held a hearing on January 12, 2017, at the Office of Administrative Hearings (OAH), in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimants represented themselves. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The Respondent failed to appear. After waiting fifteen minutes for the Respondent or someone to represent him, and after determining that proper service had been made, I proceeded with the hearing.<sup>2</sup> Code of Maryland Regulations (COMAR) 28.02.01.23A.

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. 2016); 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 that loss?

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<sup>2</sup> A December 15, 2016 Notice of Hearing was mailed by the OAH to the Respondent by certified mail at his last address of record with the Motor Vehicle Administration (12500 Stratford Garden Drive, Silver Spring, MD 20904) and was returned marked "no such number unable to forward." COMAR 09.08.03.03A(2). A September 30, 2016 Notice of Hearing was mailed by the OAH to the Respondent by certified mail at the address listed on the Respondent's contract with the Claimant as well as in the Maryland Courts Database (4500 Sandy Spring Road, Burtonsville, MD 20866) and was returned marked "not deliverable as addressed unable to forward." A May 9, 2016 letter from the MHIC to the Respondent was sent by regular and certified mail to 412 Talbott Avenue, Laurel, MD 20707, the Respondent's last address of record with the MHIC while his home improvement license was in effect. That mailing was returned marked "unable to forward."

## SUMMARY OF THE EVIDENCE

### Exhibits

I admitted the following exhibit on the Claimants' behalf:

CL #1 Package of Documents including Contract, proposals and photographs

I admitted the following exhibits on behalf of the Fund:

- GF #1 Notice of Undeliverable Mail to Respondent, 10/11/2016
- GF #2 Notice of Undeliverable Mail to Respondent, 12/27/2016
- GF #3 Respondent's MHIC Licensing Information, 1/11/2017
- GF #4 Returned certified mail to Respondent, unable to forward, 5/19/2016
- GF #5 Affidavit of Carl Suber, 1/5/2017
- GF #6 Circuit Court for Montgomery County case information, 1/11/2017
- GF #7 Hearing Order, 8/11/2016
- GF #8 Home Improvement Claim Form, 7/27/2016
- GF #9 Letter from MHIC to Respondent, 8/4/2016

### Testimony

Claimant Anozie Onyemaechi testified on behalf of the Claimants. The Respondent did not appear to testify or present the testimony of any witnesses. The Fund did not present the testimony of any 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 107724. The Respondent's MHIC license expired on April 28, 2016.

2. On November 10, 2015, the Claimant and the Respondent entered into a Contract for the Respondent to repair a deck and a storage area underneath the deck that sustained water infiltration. The project involved building a four foot high block wall, removing Trex deck boards and siding, installing framing for stability of the structure, and then reinstalling the siding, installing a door and two windows, installing an oasis water infiltration barrier in the ceiling, doing drywall finishing and reinstalling the deck boards.

3. The Contract called for installation of recessed lights, but the parties later changed that to florescent lights. The Contract also called for electrical wiring, but the parties later agreed that another contractor would perform the wiring.

4. The Contract price was \$10,500.00, which the Claimants paid in full.

5. The Respondent began work on the home on or around November 17, 2015. The work was completed on December 8, 2015.

6. Two days after the work was completed it rained, and water leaked into the storage area beneath the deck. The water leaked down all four sides of the wall; it also leaked into the florescent lights, which collected water.

7. The Claimants telephoned the Respondent multiple times in an attempt to get him to return to repair the work; however, on most occasions he did not respond.

8. On one occasion, around January or February 2016, the Respondent sent a worker to look at the storage area and to fix the leaks. The worker removed the deck boards and installed a black sealer underneath.

9. After this, the Claimants never heard from the Respondent, despite attempting to call him additional times.

10. After the black sealer was installed, when it rained the storage area still leaked, and the water that ran down the walls had a dark color. The water leaks into the storage room heavily and regularly, and the water has ruined the Claimants' personal possessions that were stored in the storage room.

11. After the Respondent's worker re-installed the deck boards, the boards started coming up so that the deck was no longer smooth.

12. The following work is necessary to correct the work the Respondent contracted to perform for the Claimants: removing the deck and the existing roof and plywood walls, re-installing framing for stability, installing a new water-proof membrane between the storage room and the deck, and then constructing a functional deck surface. The Claimants have obtained a contractor to perform this work for a price of \$14,900.00.

13. The Claimants' actual loss is \$10,500.00.

### DISCUSSION

The first issue is whether the Respondent, who did not appear for the hearing, was issued proper notice of the hearing. "If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter." Md. Code Ann., Bus. Reg. § 8-312(h) (2015). MHIC's regulations further state that the hearing may proceed in a respondent's absence if the respondent has been served and has not obtained a postponement. COMAR 09.01.02.09.

The Respondent's MHIC license expired on April 28, 2016. Numerous attempts to notify the Respondent about this action have been made, both by the MHIC and by the OAH, to multiple addresses, without success. Most recently, on December 15, 2016, a Notice of Hearing was mailed by the OAH to the Respondent by certified mail at his last address of record with the

Motor Vehicle Administration (12500 Stratford Garden Drive, Silver Spring, MD 20904) and it was returned marked "no such number unable to forward." COMAR 09.08.03.03A(2). An earlier Notice of Hearing was mailed by the OAH to the Respondent on September 30, 2016 by certified mail at the address listed on the Respondent's Contract with the Claimants as well as in the Maryland Courts Database (4500 Sandy Spring Road, Burtonsville, MD 20866) and it was returned marked "not deliverable as addressed unable to forward." A May 9, 2016 letter from the MHIC to the Respondent was sent by regular and certified mail to 412 Talbott Avenue, Laurel, MD 20707, the Respondent's last address of record with the MHIC while his home improvement license was in effect. That mailing was returned marked "unable to forward." Under these circumstances I proceeded to hear the case absent the Respondent.

Turning to the 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) (2015); *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 (2015).

The Claimant has the burden of proving the validity of his 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 (3d ed. 2000)). For the following reasons, I find that the Claimants have proven eligibility for compensation.

The Claimants argued that the Respondent performed an inadequate home improvement because he was hired to repair a deck and a storage area underneath the deck that sustained water infiltration. The project involved building a four foot high block wall, removing Trex deck boards and siding, installing framing for stability of the structure, and then reinstalling the siding, installing a door and two windows, installing an oasis water infiltration barrier in the ceiling, doing drywall finishing and reinstalling the deck boards.

Instead, the Respondent's work caused the water infiltration to become much worse. After the completion of the job, the water leaked into the storage room heavily and regularly, and the water has ruined the Claimants' personal possessions that were stored in the storage room. Claimant Anozie Onyemaechi testified credibly as to the leaks, and he provided photographs that corroborated his testimony. He testified about his attempts to contact the Respondent to correct the work, most of which went unanswered. He explained that, on one occasion the Respondent sent a worker to look at the storage area and to fix the leaks. The worker removed the deck boards and installed a black sealer underneath. However, this made the problem worse, not better, in that the water leakage continued after his "repairs" but the infiltrating water turned black. He also explained that, after the worker reinstalled the deck boards, they started coming up and were no longer smooth.

I find that the Claimant's testimony was compelling. He established that the Respondent was required by the Contract to waterproof a storage room under a deck area and to reinstall a functioning deck. What he installed instead was a structure that leaked water even worse than before, and a deck that was uneven. Because the Respondent did not appear for the hearing, I infer that he does not dispute the Claimant's assertions.

For this and all of the reasons stated above, I find that the Claimants have met their burden of proof.

The MHIC may deny a claim if it finds that the “claimant unreasonably rejected good faith efforts by the contractor to resolve the claim.” Md. Code Ann., Bus. Reg. § 8-405(d) (2015). I do not find that the Respondent made any good faith efforts to resolve the claim. The Respondent never made any adequate repairs and he stopped communicating with the Claimants.

Having found eligibility for compensation, I now turn to the amount of the award, if any, to which the Claimants are 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). Of the three, 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. 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 obtained two estimates. One, by Dove Remodeling Service, in the amount of \$56,000.00, contemplated services that went well beyond the scope of the Claimants’ Contract with the Respondent because it involved the demolition and rebuilding of the entire storage room-deck structure. The second estimate, by Nuvision Home Improvement, Inc., reasonably proposes to correct the poor work performed by the Respondent by removing the deck and the



existing roof and plywood walls, re-installing framing for stability, installing a new water-proof membrane between the storage room and the deck, and then constructing a functional deck surface. Based on the Nuvision estimate of \$14,900.00, and in accordance with COMAR 09.08.03.03B(3)(c), the Claimant's loss is calculated as follows:

Amount paid to Respondent under original contract	\$10,500.00
+ Reasonable amount to repair	<u>\$14,900.00</u>
TOTAL	\$25,400.00
- Less the original contract price	<u>\$10,500.00</u>
TOTAL/ACTUAL LOSS	\$14,900.00

However, the MHIC may not award from the Fund an amount in excess of the amount paid by a claimant to the contractor against whom the claim is filed. Md. Code Ann., Bus. Reg. § 8-405 (e)(5) (2015). Accordingly I will recommend that the MHIC award the Claimants the amount of \$10,500.00.

**PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimants have sustained an actual and compensable loss of \$14,900.00 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). I further conclude that the MHIC may not award from the Fund an amount in excess of the amount paid by the Claimants to the Respondent, which in this case was \$10,500.00. Md. Code Ann., Bus. Reg. § 8-405 (e)(5) (2015).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimants \$10,500.00; 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 at least ten percent (10%) as set by the Maryland Home Improvement Commission;<sup>3</sup> and

**ORDER** that the Maryland Home Improvement Guaranty Fund grant the Claimants' claim; and

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

**Signature on File**

(15)

January 31, 2017  
Date Decision Issued

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Neile S. Friedman  
Administrative Law Judge

NSF/sm  
#166211

<sup>3</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

**PROPOSED ORDER**

***WHEREFORE, this 8<sup>th</sup> day of March, 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**

