

IN THE MATTER OF THE CLAIM	* BEFORE GERALDINE A. KLAUBER,
OF ALLISON CARTER and JACOB	* AN ADMINISTRATIVE LAW JUDGE
CARTER, <sup>1</sup>	* OF THE MARYLAND OFFICE
CLAIMANTS	* OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	*
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF JAMES MARTIN,	* OAH No.: DLR-HIC-02-18-07503
T/A PROMPT RESTORATION, INC.	* MHIC No.: 17 (75) 290
RESPONDENT	*
* * * * *	* * * * *

**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSIONS OF LAW  
RECOMMENDED ORDER

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**STATEMENT OF THE CASE**

On January 25, 2018, Allison Carter and Jacob Carter (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$72,631.60 in actual losses allegedly suffered as a result of a home improvement contract with James Martin, trading as Prompt Restoration (Respondent).

I held a hearing on April 27, 2018, at the Bel Air Branch Library, 100 E. Pennsylvania Avenue, Bel Air, Md. Code Ann., Bus. Reg. § 8-407(e) (2015). The Claimants represented

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<sup>1</sup> Jacob Carter signed the Home Improvement Claim form. At the commencement of the hearing the Claimant requested that his wife, Allison Carter, be added as a Claimant. The Fund had no objection to the request and the request was granted.

themselves. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.<sup>2</sup>

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. 2017); 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?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits on the Claimants' behalf:

- Clmt. Ex. 1 - Prompt Restoration Contract, March 29, 2016
- Clmt. Ex. 2 - Prompt Restoration Scope of Work, February 5, 2016
- Clmt. Ex. 3 - Bank of America check in the amount of \$20,000.00, March 30, 2016
- Clmt. Ex. 4 - United States Bankruptcy Court notice, October 14, 2016
- Clmt. Ex. 5 - Email exchange between the Respondent and Claimant, Allison Carter, September 8, 2016
- Clmt. Ex. 6 - Bank of America check in the amount of \$32,631.60, dated April 5, 2016

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<sup>2</sup> Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on March 14, 2018, COMAR 09.08.03.03A(2). The domestic return receipt was signed on behalf of the Respondent on March 17, 2018. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter.

Clmt. Ex. 7 - Prompt Restoration Structure Demolition and Debris Removal Estimate, February 9, 2016

Clmt . Ex. 8 - Letter from Justin Alex, Esquire to Respondent, September 19, 2016

Clmt. Ex. 9 - Email exchange between Respondent and Mark Clark, Senior Major Loss Adjuster, MetLife, October 3 and October 4, 2016; Email exchange between Claimant, Allison Carter, and Mark Clark, October 5 and October 7, 2016

Clmt. Ex. 10 - Architectural Drawings for 552 Old Joppa Road

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Hearing Order, February 14, 2018

Fund Ex. 2 - Notice of Hearing, March 14, 2018

Fund Ex. 3 - Letter from HIC to the Respondent, January 25, 2018

Fund Ex. 4 - Affidavit of Kevin Niebuhr, April 26, 2018

Fund Ex. 5 - HIC Licensing History of Respondent, April 26, 2018

The Respondent did not appear for the hearing and, thus, no exhibits were offered.

### Testimony

The Claimants testified on their own behalf.

The Respondent failed to appear and, thus, no testimony was offered on his behalf

~~The Fund offered 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 Maryland licensed home improvement contractor.

2. On January 28, 2016, the Claimants' home, located in Joppa Maryland, was destroyed in a fire.

3. Within a week of the fire, the Claimants filed a claim under their homeowner's insurance policy with Met Life. Met Life surveyed the home and estimated the damage to the home.

4. On March 29, 2016, the Claimants and the Respondent entered into a contract (Contract) for demolition, construction and renovation of the Claimants' home. The scope of work to be performed under the Contract was taken from Met Life's estimate.

5. The original agreed-upon Contract price was \$240,628.19.

6. Funds received from Met Life for the work to be performed under the Contract were placed in an escrow account with the Bank of America. Checks were issued in the names of the Respondent and Claimants.

7. On a date uncertain, the Claimants paid the Respondent \$20,000.00 to obtain architectural drawings and to commence work.<sup>3</sup>

8. The Contract included demolition work, but the Claimants performed some of the demolition themselves. The Respondent subtracted \$7,000.00 from the Contract price as a credit for the demolition work performed by the Claimants.

9. On March 30, 2016, the Claimants paid the Respondent an additional \$20,000.00 for the purchase of roof trusses.

10. The Claimants contacted Pro Build and they were informed that Pro Build had no record of the Respondent ordering trusses.

11. The trusses were never ordered or delivered to the Claimants.

12. On April 5, 2016, the Respondent received a check from Bank of America in the amount of \$32,631.60 to allegedly cover the cost of demolition. The Respondent received the check directly from Bank of America and forged the Claimants' endorsements on the check.

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<sup>3</sup> The Claimants did not have a copy of the check or a receipt that verified the initial \$20,000.00 payment to the Respondent.

13. In April 2016, the Respondent performed some demolition work and some structural cleaning.

14. The Respondent failed to return to the work site on a regular basis. The Claimants attempted to contact the Respondent by telephone approximately five or six times per week and left messages. The Respondent did not return the Claimants' calls

15. On September 6, 2016, the Claimants received an email from the Respondent requesting that the Claimants allow the Respondent to complete the Contract.

16. By letter dated September 19, 2016, the Claimants' attorney instructed the Respondent not to contact the Claimants or perform any additional work under the Contract. The letter also requested that the Respondent provide an accounting of work performed and monies spent by the Respondent. The Respondent did not respond to the letter.

17. On October 3, 2016, the Respondent contacted MetLife and requested the release of more funds.

18. On October 5, 2016, the Claimants instructed Met Life not to release any additional funds to the Respondent.

19. The Claimants received an October 14, 2016 notice of the Respondent's filing of bankruptcy from the United States Bankruptcy Court, District of Maryland.

20. The Claimant performed approximately 60 percent of the required demolition work but did not perform any other work under the Contract.

21. The Claimants hired another contractor, Plum Construction, to complete the restoration of the home with the remaining insurance funds.

22. The Respondent removed the kitchen cabinets from the home for cleaning but did not return the cabinets. The Claimants paid out of pocket approximately \$12,000.00 for the purchase of new kitchen cabinets.

## DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).<sup>4</sup> “[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); *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 Claimants have proven eligibility for compensation.

On March 29, 2016, the Claimants entered into a Contract with the Respondent to demolish and essentially replace their home that had been destroyed by a fire on January 28, 2016. The total Contract price was \$240,628.19. The Claimants completed some of the demolition work themselves and the Respondent credited them \$7,000.00 for that work, bringing the total contract price to \$233, 628.19. The Claimants established that the only work performed by the Respondent was approximately 60 percent of the demolition work.

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<sup>4</sup> Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume of the Maryland Annotated Code.

The Claimants provided credible testimony<sup>5</sup> and copies of checks that established the Respondent received \$72,631.60 from the insurance proceeds. The Respondent received an initial \$20,000.00 to obtain architectural drawings and begin work. The Respondent received an additional \$20,000.00 on March 30, 2016 to purchase roof trusses. The trusses, however, were never ordered by the Respondent or delivered to the Claimants. The Respondent also received \$32,631.60 for demolition work by forging the Claimants signatures on a check issued by the Bank of America. The Respondent had performed approximately 60 percent of the demolition at the time he converted the funds.

The Claimants hired an attorney, who by letter of September 19, 2016, instructed the Respondent to cease any work under the Contract, provide an accounting of the funds and return the unused funds to the Claimants. The Respondent did not respond to the request and on October 4, 2016, the Respondent attempted to obtain more funds from the Bank of America. By email of October 5, 2016, the Claimants informed the Bank of America not to issue any more funds to the Respondent. Other than the partial demolition, the Respondent did not perform any work within the scope of the Contract and has not returned any money to the Claimants.

The Claimants are entitled to reimbursement from the Fund as all of the statutory requirements for reimbursement have been met. The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. As of October 2016, the Respondent received \$72,631.60 and \$32,631.60 of that amount was obtained fraudulently when the Respondent forged the Claimants' signatures on a check issued from escrow by the Bank of America. Despite receiving significant funds, other than some minor

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<sup>5</sup> Although the Claimants did not have any documentation that established their initial \$20,000.00 payment to the Respondent, I found their testimony regarding this payment to be credible.

demolition work, the Respondent had not performed any work as provided for in the March 29, 2016 Contract. In addition to receiving the funds, the Respondent removed the Claimants' kitchen cabinets to be cleaned and returned. The cabinets were never returned by the Respondent. The Claimants had to obtain a new contractor to complete the work, but had fewer funds available to them due to the Respondent's unscrupulous actions. Based on the Respondent's actions, the Claimants are eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimants' actual loss and the amount, if any, that the Claimants are entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. COMAR 09.08.03.03B(3).

In this case, the Respondent performed some demolition work under the Contract, and the Claimants have retained other contractors to complete the scope of work provided for in the Contract. Accordingly, the following formula appropriately measures the Claimants' actual loss:

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).



Employing this formula I have calculated the Claimants' actual loss as follows:

Amount paid to Respondent	\$72,631.60
	+
Cost to complete contract	<u>\$252,628.19<sup>6</sup></u>
	\$325,259.79
Less original contract price	<u>\$233,628.19<sup>7</sup></u>
Actual loss	\$91,631.60

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimants' actual loss of \$91,631.60 exceeds \$20,000.00. Therefore, the Claimants' recovery is limited to \$20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

#### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimants have sustained an actual and compensable loss of \$20,000.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimants are entitled to recover \$20,000.00 from the Fund.

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#### **RECOMMENDED ORDER**

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

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

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<sup>6</sup> Although the Claimants testified that they spent \$12,000.00 out of pocket for the purchase of kitchen cabinets, the Claimants did not have any receipts to establish this cost.

<sup>7</sup> I derived the original contract price by taking the contract price of \$240,620.19 less the \$7,000.00 credit given to the Claimants for the demolition work performed by the Claimants.

**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,<sup>8</sup> and

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

## Signature on File

July 24, 2018  
Date Decision Issued

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Geraldine A. Klauber  
Administrative Law Judge

GAK/sw  
#174955

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

**PROPOSED ORDER**

***WHEREFORE, this 30<sup>th</sup> day of August, 2018\, 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.***

***Michael Shilling***

***Michael Shilling  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**