

**IN THE MATTER OF THE CLAIM
OF MIGUELINA NIEVES,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JAMES HOWELL,
T/A HOWELL & SON,
RESPONDENT**

*** BEFORE WILLIAM SOMERVILLE,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: LABOR-HIC-02-21-19667
* MHIC No.: 20 (75) 816**

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PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On May 18, 2020, Miguelina Nieves (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of \$20,000.00 for actual losses she alleges that she suffered as a result of a home improvement contract with James Howell, trading as Howell & Son (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015).¹ On August 2, 2021, the MHIC issued a Hearing Order referring the case to the Office of

¹ Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

Administrative Hearings (OAH). On August 27, 2021, the MHIC forwarded the case to the OAH for a hearing.

On September 24, 2021, I held a hearing at the Administrative Law Building in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Andrew Brouwer, Assistant Attorney General, represented the Fund. The Claimant represented herself. Wayne S. Goddard, Esquire, represented the Respondent, who was present.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); Code of Maryland Regulations (COMAR) 09.01.03; and 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

Clmt. Ex. 1 - Contract document with attachments, 6-25-2015

Clmt. Ex. 2 - Packet of photographs, with captions, tabbed A through Q (the captions are not in evidence)

I admitted the following exhibits offered by the Respondent:

Resp. Ex. 1 - Completion certificate, 5-9-2016

Resp. Ex. 2 - Electrical permit, 5-6-2016

Resp. Ex. 3 - Email message, 2-10-2016

Resp. Ex. - Packet of checks, various dates

I admitted the following exhibit offered by the Fund:

Fund Ex. 1 - Hearing Order with attachments

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and did not present other witnesses.

PROPOSED FINDINGS OF FACT

Having considered demeanor evidence, testimony, and other evidence, I find the following facts by a preponderance of the evidence:

1. At all times relevant, the Respondent was licensed by the MHIC as a home improvement contractor. He held the home improvement contractor's license for his corporation, Howell & Son Contracting, Inc.
2. On or about June 25, 2015, the Claimant, her spouse, and the Respondent's corporation entered into a contract by which the Claimant was to pay \$165,259.64 of fire insurance proceeds and the corporation was to rebuild the Claimant's residence in Howard County which had been destroyed by fire. To the contract document was attached, and incorporated by reference, an extremely detailed list and estimate of items covered by the fire insurance policy issued by Travelers Insurance Company. Also attached were detailed renderings as well as an addendum by which the parties agreed to a few extra items not covered by the fire insurance proceeds. Included was also an option to have a garage built. No exterior deck was included in the contract. Other than the dwelling, the contract and insurance estimate covered cleaning an exterior structure – a small brick wall – for \$378.27 and it categorized that limited work as “landscaping – other structures.” (Cl. Ex. 1, estimate document at p. 30.) Roof repairs were specifically excluded from the contract. There was nothing in the contract to

require installation of plywood behind existing siding in the attic. The contract document contained installation of an attic fan.

3. At some point thereafter, the Respondent's corporation began work on the extensive project.

4. Throughout the term of the project, the Claimant and the Respondent's corporation had numerous disagreements concerning the project.

5. On July 15, 2015, the Claimant issued a check for \$10,000.00 to the Respondent's corporation.

6. On September 4, 2015, the Claimant endorsed over a check from Travelers Insurance Company to the Respondent's corporation for \$6,590.00.

7. On or about November 25, 2015, the Claimant endorsed over a check from Travelers Insurance Company to the Respondent's corporation for \$62,087.60.

8. On or about January 1, 2016, the Claimant and her spouse moved back into the residence; the project was still on-going.

9. Sometime in 2016, the Claimant expressed to the Respondent's corporation that she was not satisfied with where the Respondent's corporation, or a subcontractor, had located a water pressure tank and water softening tanks in the basement of the residence.

10. Sometime in 2016, the Claimant noticed a four-inch round hole in the foundation of the residence.

11. On February 10, 2016, the Claimant presented the Respondent with a list of items that she expected to be completed under the contract.

12. On or about February 12, 2016, the Claimant endorsed over a check from Traveler's Insurance Company to the Respondent's corporation for \$28,841.59.

13. On May 6, 2016, an electrician sub-contractor on the project applied to the Howard County government for an electrical permit in order to relocate an air conditioning unit. That permit was issued, and the work was done, and then it was inspected and passed by a county electrical inspector.

14. On May 9, 2016, the Claimant signed a document stating that the "scope of repairs is 100% complete" and releasing "the recoverable depreciation [amount]" to the Respondent's corporation. (Resp. Ex. 1 and Clmt. Ex. 1, p. 32.)

15. On or about May 11, 2016, the Claimant endorsed over a check from Traveler's Insurance Company to the Respondent's corporation for \$12,325.46.

16. On or about June 8, 2016, the Claimant endorsed over a check from Traveler's Insurance Company to the Respondent's corporation for \$48,826.00.

17. Sometime in 2016, the Claimant noticed the following items that did not meet her satisfaction: one doorstop had not been installed; a bathroom light fixture was installed in such a way that it was difficult to change a lightbulb in the fixture; a towel rack was secured only to drywall; a battery-powered doorbell fell off of the door molding (and the Respondent's corporation repaired that item); the Claimant was not fully satisfied with the installation of a kitchen sink faucet; the Claimant was not fully satisfied with the way that a pocket door was installed in the basement; and the Claimant was not fully satisfied with the way that an attic fan was installed.

18. Sometime in 2017, the Claimant noticed some condensation on some windows of her residence.

19. Sometime in 2019, the Claimant noticed that three gutter fasteners were protruding from the fascia board and a front door was not entirely flush with door molding.

20. In 2020, the Claimant noticed that some wood screws were exposed on the inside of a vanity.

21. On February 4, 2020, the Claimant filed a claim against the Fund for \$20,000.00.

DISCUSSION

Burdens

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); Md. Code Ann., State Gov't § 10-217 (2021); COMAR 09.08.03.03A(3). To prove elements of a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). The other parties bear the burdens to show, by a preponderance of the evidence, that the three-year statute of limitations has run. COMAR 28.02.01.21K(1), (2)(b).

An owner may recover compensation from the Fund by showing “an actual loss that results from an act or omission by a licensed contractor.” Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor.”). “[A]ctual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401.

Arguments of the Parties

The Claimant argues that there were deficiencies in the work performed by the Respondent’s corporation.

The Respondent argues that the Claimant did not meet her burdens in that there was no credible evidence of incomplete, inadequate, or unworkmanlike performance, and there was no credible evidence of the costs of repair or restoration. Noting that most of the Claimant’s

complaints were of items discovered in or before 2016, the Respondent also invokes the three-year statute of limitations.

The Fund argues that the Claimant has not offered sound evidence of the Respondent not meeting industry standards and has not offered evidence of costs. The Fund also argues that the claim is time-barred.

Limitations Rule

The relevant statute provides “a claim shall be brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage.” Md. Code Ann. Bus. Reg. § 8-405(g); *see also* COMAR 09.08.03.02G. In the instant case, the Claimant testified that most of the items about which she complains were discovered in 2016. (Findings of Fact 9, 10, 11, and 17.) The few minor items that she noted she discovered thereafter were items that, by ordinary diligence, should have been discovered before a point -- February 4, 2017 -- three years before the date that she filed the claim. (Findings of Fact 18, 19, and 20.) I agree with the Respondent and the Fund on that point. The case is dismissible on the statute of limitations.

Merits

It is undisputed that the Respondent was a licensed home improvement contractor at the time of the Contract with the Claimant.

It has not been shown, however, that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements. In order to show performance that does not meet industry standards, a claimant generally must offer into evidence the standard, and offer an opinion about how a respondent has violated that standard. Typically, expert witnesses are employed to offer such opinions. No expert opinion evidence was offered in the instant case.

Alternatively, if a contractor's work product is so extremely poor, and that poor workmanship is reflected in photographs, or otherwise in the extreme circumstances of the case, then no expert opinion is necessarily needed to allow a conclusion that the workmanship is subpar. That situation did not exist in the instant case. I cannot conclude from the evidence before me that the Respondent, or his corporation, violated home improvement industry standards, or otherwise performed unworkmanlike, inadequate, or incomplete home improvement work. Md. Code Ann., Bus. Reg. § 8-405(a). The case is dismissible on that point.

Even if, however, I could determine from this evidentiary record that the Respondent or his corporation performed below industry standards, the Claimant did not offer credible costs of remedying the work. “[A]ctual 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(emphasis added). “Actual loss” is one element that a claimant must prove in order to be compensated by the Fund. The Claimant in the instant case did not offer such costs. The case is dismissible on that point. I thus conclude that the Claimant has not shown eligibility for compensation from the Fund.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has not shown that she has sustained an actual and compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015). I also conclude that the Claimant's claim against the Home Improvement Guaranty Fund is barred by the three-year statute of limitations. Md. Code Ann., Bus. Reg. § 8-405(g) (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

December 17, 2021
Date Decision Issued

William J.D. Somerville III

William J.D. Somerville III
Administrative Law Judge

WS/emb
#195412

PROPOSED ORDER

WHEREFORE, this 13th day of April, 2022, 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

Chairman

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**