

OF LINDA VAUGHN,

\*

AN ADMINISTRATIVE LAW JUDGE

CLAIMANT

\*

OF THE MARYLAND OFFICE

AGAINST THE MARYLAND HOME

\*

OF ADMINISTRATIVE HEARINGS

IMPROVEMENT GUARANTY FUND

\*

FOR THE ALLEGED ACTS OR

\*

OMISSIONS OF BRIAN GUMMEL,

\*

T/A THE PAINTING COMPANY,

\*

RESPONDENT

\*

OAH No.: DLR-HIC-02-16-28395

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MHIC No.: 15,901061

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**STATEMENT OF THE CASE**

On or about February 22, 2017, Linda Vaughn (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) in the amount of \$6,500.00 for reimbursement for alleged actual losses suffered as a result of a home improvement contract with Brian Gummel, trading as The Painting Company (Respondent).

I convened a hearing on June 27, 2017, at the Prince George's County Office Building, 1400 McCormick Drive, Largo, Maryland 20774. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-

407(e) (2015).<sup>1</sup> The Claimant was present and represented herself. The Respondent was also present and represented himself. Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), MHIC, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, 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); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

### ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent?
2. If so, what is the amount of that loss?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted the following exhibits on behalf of the Claimant:

- Cl. Ex. 1 Proposal from The Painting Company for the removal and installation of a new floor in the family room, hallway, kitchen and foyer, dated April 27, 2014
- Cl. Ex. 2 Letter from the Claimant to the Respondent, dated June 25, 2014
- Cl. Ex. 3 Emails between the Claimant and the Respondent, dated July 3, 2014 through July 4, 2014
- Cl. Ex. 4 Contract proposal from Exus Contractors, dated June 23, 2016

I admitted the following exhibits on behalf of the Respondent:

- Resp. Ex. 1 Complaint Form, DLLR from the Claimant to the MHIC, dated April 13, 2015
- Resp. Ex. 2 Contract between the Claimant and the Respondent, dated May 9, 2014, and reverse side Customer Reference Card, undated

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<sup>1</sup> All citations to the Business Regulation Article refer to the 2015 Volume.

~~I admitted the following exhibits on behalf of the Fund:~~

- Fund Ex. 1 Notice of Hearing, dated March 7, 2017
- Fund Ex. 2 Hearing Order, dated September 7, 2016
- Fund Ex. 3 Respondent licensing history, dated June 26, 2017
- Fund Ex. 4 Home Improvement Claim Form, dated June 30, 2015
- Fund Ex. 5 Letter from Kevin Niebuhr, Investigator, MHIC, to Respondent, dated August 15, 2016

**Testimony**

The Claimant testified on her own behalf. The Respondent testified on his own behalf.

There was no testimony presented on behalf of the Fund.

**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/salesman under MHIC license number 01-80537. His license will expire on August 31, 2019.
2. On or about May 9, 2014, the Claimant entered a written contract (Contract) with the Respondent to provide home improvement services at the Claimant's residence located at 4205 Lakeview Drive, Temple Hills, Maryland. The Contract called for various home improvements including the replacement of 560 square feet of oak flooring in the family room, hallway, kitchen and foyer (Project). The total price to perform the Contract was \$6,500.00. The special notes in the Contract included fixing squeaks in the subfloor.<sup>2</sup>
3. Work began on the Project on May 20, 2014 and was completed the following day, May 21, 2014.
4. The Claimant paid the entire Contract price of \$6,500.00.

<sup>2</sup> The Claimant also contracted with the Respondent to have certain rooms painted in her home; however, that work is not part of the Claimant's claim.

5. Prior to entering into the Contract, the Respondent offered to remove and replace the subfloors for an additional cost, but the Claimant declined the Respondent's offer. Replacing the subfloor is the only completely effective way to stop squeaks in flooring.

6. When the Project was completed, the Claimant filled out a Customer Reference Card indicating that the work performed by the Respondent on the Project was excellent and that she would recommend the Respondent to others. (Resp. Ex. 2).

7. During the walk-through following completion of the Project, the Claimant and the Respondent did not notice any squeaks in the flooring that the Respondent installed.

8. The Respondent received an email from the Claimant on July 3, 2014 in which she attached a letter, dated June 25, 2014 (Cl. Ex. 2), that outlined the problems she observed with the painting performed at her home by the Respondent. She also mentioned that there was a small hole in the floor in the kitchen area, but did not mention any squeaking of the floors that were installed by the Respondent.

9. On April 8, 2015, the Claimant filed a Complaint Form with the DLLR claiming that in addition to flaws in the paint, her floor had begun to "squeak."

10. On July 20, 2015, Brian McGeeney, Sales Manager for the Respondent visited the Claimant's home to inspect the Project and the Claimant's other complaints concerning the paint. Mr. McGeeney was unable to replicate any squeaking in the floors that the Claimant claimed had recently begun as stated in the complaint she filed with the MHIC on April 8, 2015.

11. On June 30, 2015, the Claimant filed a claim with the MHIC seeking reimbursement from the Fund in the amount of \$6,500.00

#### **DISCUSSION**

At a hearing on a claim, a claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1). A homeowner 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).~~

see also COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for actual losses they 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. A claimant may not recover from the Fund any amount for “(a) Consequential or punitive damages; (b) Personal injury; (c) Attorney’s fees; (d) Court costs; or (e) Interest.” COMAR 09.08.03.03(B)(1). For the following reasons, I find that the Claimant has not proven eligibility for compensation.

It is undisputed that the Respondent was a licensed home improvement contractor under MHIC license number 01-80537 at all times relevant to this case. His license is currently valid.

The undisputed evidence established that on May 9, 2014, the Claimant entered the Contract with the Respondent to provide home improvement services on her home in Temple Hills, Maryland. The Respondent was to remove and replace flooring in the family room, hallway, kitchen and foyer with 560 square feet of two and one-quarter inch oak flooring. The Contract also indicated that part of the Contract was to fix squeaks in the subfloor. The Respondent offered to remove and replace the subfloor, but the Claimant declined. Replacing the subfloor is the only completely effective way to stop squeaks in flooring. The work was started on May 20, 2014 and was completed the following day. Following completion of the work, the Claimant and the Respondent conducted a walk-through of the Project area, and the Claimant concluded that she was very satisfied with the work by signing a “Customer Reference Card” that included an overall excellent rating of the work performed. She also indicated that she would recommend the Respondent to others. No squeaks were heard in the new flooring that the Respondent installed.

The Claimant testified at the hearing that after a few short weeks, the squeaks in the kitchen and hallway floors started to reoccur. There were no squeaks reported in the hallway and foyer. She sent a letter to the Respondent that was returned by the United States Post Office. In that letter, she claimed that there was a small hole in the floor of the kitchen area and mentioned issues she had with the paint, but did not mention any squeaking of the floors in that letter. Since the letter was returned by the United States Post Office, she sent the same letter as an attachment to an email to the Respondent on July 3, 2014 (Cl. Ex. 3). She did not mention anything about squeaking floors in her cover email to the Respondent.

Nearly a year after the Project was completed, on April 8, 2015, the Claimant filed a Complaint Form with the MHIC claiming about the flaws in the paint and mentions, for the first time in writing, that her floors had begun to squeak. Her written statement to the MHIC conflicts with her oral testimony at the hearing that the floors began to squeak after a few days following installation. Later during the hearing, under cross-examination, she stated that they began to squeak after a few weeks.

On July 20, 2015, the Respondent sent his sales manager, Brian McGinney, to the Claimant's home to inspect the Project and to verify whether the floors that the Respondent installed squeaked. He was unable to replicate any squeaks in the floor. The Claimant was present during the inspection. The Respondent's flooring supervisor, Jorge, also inspected the floors in 2015 and was unable to detect any squeaks.

On June 23, 2016, the Claimant obtained an estimate from Exus Contractors, to install 460 square feet of new hardwood flooring in the family room, living room and hallway. The total price for this work was \$6,500.00. The proposal did not include removal and replacement of the subfloor and did not include any flooring in the kitchen area, which was one of the areas that the Claimant claimed was squeaking. The proposal was not accepted by the Claimant and

~~no work has been done by Exus Contractors or any other contractor to address the squeaking~~

floors.

As set forth above, in order to establish an actual loss, the Claimant must show the amount required to be paid to another contractor "to repair poor work done by the original contractor." The Claimant must, therefore, prove, first, that the Respondent's work was "unworkmanlike, inadequate, or incomplete." Md. Code Ann., Bus. Reg. § 8-401. In this case, the Claimant has failed to prove by a preponderance of the evidence that the Respondent's work was unworkmanlike, inadequate, or incomplete. First, at the completion of the Project, the Claimant and the Respondent's representative conducted a walk-through of the Project area. The Claimant was pleased with the work. She characterized the Respondent's work as excellent and indicated that she would recommend the Respondent to others.

The Project was completed on May 21, 2014. A month later, on June 25, 2014, the Claimant sent a letter to the Respondent in which she complained about paint issues that were not part of the Contract that is the subject of this dispute. She also mentioned a small hole in the floor in the kitchen area, but aside from that issue, she stated that "the floors look great." She never mentioned anything about squeaking floors. Nearly another year goes by and the Complainant files a Complaint Form with the MHIC in which she continues to complain about paint but, for the first time in writing, mentions that her floors have begun to squeak and no one has contacted her. It is noteworthy that when the Contract was proposed, the Respondent explained to the Claimant that the only truly effective way to stop squeaks in floors is to remove and replace the subfloors. Although the Respondent was not offered as an expert in flooring, he has experience in the area and has consulted with others who have confirmed that removing and replacing subfloors is the most effective way to eliminate squeaking floors. When this option was offered to the Claimant at the time the contract proposal was being discussed, the Claimant

elected not to have the subfloors removed and replaced. When Mr. McGinney visited the Claimant's home on July 20, 2015, he was unable to replicate the squeaking in the floors that were installed by the Respondent. Finally, when the Claimant was asked if she had any evidence to prove that the floors squeaked other than her testimony, the Claimant was unable to provide any evidence, even though a video recording made on a cell phone could have corroborated her testimony. I did not find the Claimant to be a credible witness. As previously stated, she claimed during her testimony that the squeaks started days and then weeks after the floors were installed. She then stated nearly a year later in the Complaint Form that the floor had begun to squeak, suggesting that the squeaking occurred much later than what she had testified to. Additionally, the Claimant stated in both her testimony and in her June 25, 2014 letter to the Respondent that she was being treated unfairly by the Respondent because she does not live in Annapolis or Potomac, Maryland or Fairfax County, Virginia. I found these statements self-serving and without foundation. The Respondent took exception to her characterization both in response to her June 25, 2014 letter and at the hearing. There is simply no evidence to support any such discriminatory treatment by the Respondent towards the Claimant.

Having failed to prove that the Respondent's performance was not unworkmanlike, inadequate, or incomplete, the Claimant's claim fails. Even if she was able to prove that the Respondent's performance was unworkmanlike, inadequate or incomplete, and thereby establish that she suffered an actual loss, the Claimant would also have to prove the actual dollar amount required to correct the problem. She has failed to prove that as well.

The Claimant obtained a proposal from Exus Contractors on June 23, 2016 to install hardwood floors in the family room, living room and hallway. The proposed price for this work was, coincidentally, \$6,500.00, the same cost for the work performed by the Respondent. However, the proposal includes installing flooring in the living room which was not included in



~~the Contract. More importantly, the proposal does not mention either the kitchen or the foyer~~

floors. The Claimant testified that the squeaking in the floors only occur in the hallway and the kitchen. The proposal from Exus does not include removal and replacement of subfloors and does not include a specific area (kitchen) that is the subject of the Claimant's claim. It does, however, include other areas that were not part of the Contract.

Therefore, based on the above considerations, the Claimant is not entitled to reimbursement from the Fund. Md. Code Ann., Bus Reg. § 8-405(e)(1)

### **PROPOSED CONCLUSION OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has not sustained an actual loss compensable by the MHIC Fund as a result of the Respondent's alleged acts and omissions. I am, thus, unable, for the reasons stated above, to recommend an award. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405; and COMAR 09.08.03.03B(3)(c).

### **PROPOSED ORDER**

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


**ORDER** that the Claimant's Fund claim be **DENIED**; and

**ORDER** that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

**Signature on File**

September 12, 2017  
Date Decision Issued

  
Stuart G. Breslow  
Administrative Law Judge

SGB/cj  
#169506

**PROPOSED ORDER**

***WHEREFORE, this 25<sup>th</sup> day of October 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**