

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

ISAAC BROWN

Petitioner

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*

For Judicial Review of the Decision of the

CASE No. 442322-V

*

MARYLAND HOME IMPROVEMENT COMMISSION

Respondent

*

In the Case Of: Giacchino v. Brown

*

Agency Ref. No. 16 (90) 812

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ORDER OF DISMISSAL

Having considered the Motion to Dismiss filed by the Maryland Home Improvement Commission, and any response thereto, it is this 19 day of June, 2018, by the Circuit Court of Montgomery County

ORDERED, that the Motion to Dismiss be and hereby is GRANTED; and it is further

ORDERED, that pursuant to Maryland Rule 7-207(d), the petition for judicial review be and hereby is DISMISSED with prejudice based upon the Petitioner's failure to file a Memorandum as required by Maryland Rule 7-207(a).

Signature on File

JUDGE



Copies to:

Shara Hendler
Assistant Attorney General

Isaac Brown

ENTERED

JUN 19 2018
Clerk of the Circuit Court
Montgomery County, Md.

**IN THE MATTER OF THE CLAIM
OF MICHAEL AND LOUIS
GIACCHINO
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ACTS OR OMISSIONS
OF ISAAC BROWN
t/a 3D RESIDENTIAL, LLC**

**MARYLAND HOME IMPROVEMENT
COMMISSION**

**MHIC CASE NO. 16(90)812
OAH CASE NO. DLR-HIC-02-16-25389**

* * * * *

FINAL ORDER

On October 5, 2017, a hearing on the exceptions filed in the above-captioned matter was held before a three-member panel (“Panel”) of the Maryland Home Improvement Commission (“MHIC”). The exceptions were filed by the contractor, Isaac Brown t/a 3D Residential, LLC, (“Contractor”), who was present without counsel. The claimants Michael and Louis Giacchino (“Claimants”) were also present without counsel. Kris King, Assistant Attorney General, appeared at the exceptions hearing to present evidence on behalf of the MHIC.

The matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings on February 27, 2017. Following the evidentiary hearing, the ALJ issued a Recommended Decision on May 16, 2017, concluding that the Claimants sustained an actual and compensable loss of \$12,628.00 as a result of the Contractor’s acts and omissions, including incomplete and unworkmanlike home improvement. *ALJ Recommended Decision* p. 18. In a Proposed Order dated June 8, 2017, MHIC affirmed the Recommended Decision of the ALJ to award the Claimants \$12,628.00 from the Guaranty Fund. The Contractor subsequently filed exceptions of the MHIC Proposed Order, and a hearing was set before the Panel.

Both the Claimants and the Contractor filed requests to admit additional evidence at the exceptions hearing. The test that must be met in order to admit additional evidence is found at Code of Maryland Regulations (“COMAR”) 09.01.03.09K. Under the test a party must prove that the additional evidence “(1) Is relevant and material; (2) Was not discovered before the ALJ

hearing; and (3) Could not have been discovered before the ALJ hearing with the exercise of due diligence.” Both parties were given the opportunity to present oral argument regarding their request for the admission of additional evidence. The Claimants withdrew their request at the hearing. The Contractor sought to admit the building plans of the addition that the Contractor built for the Claimants, as well as, estimates he obtained after the evidentiary hearing before the ALJ. The Contractor admitted that he knew of the building plans prior to the hearing before the ALJ, but forgot to bring them, and did not offer any further explanation as to why he could not have obtained or produced the estimates at the prior hearing. Therefore pursuant to COMAR 09.01.03.09K, the Panel denied the Contractor’s request to admit new evidence.

After ruling on the Contractor’s request to present additional evidence, the Panel allowed the Contractor to present further argument as to why the ALJ’s decision should be overturned. The Contractor contended that the estimate previously submitted into evidence by the Claimants to show the cost to complete the paint and caulk work on the exterior of the addition was too high. The Contractor also argued that the ALJ placed the burden of proof on him instead of the Claimants.

As for the estimate of exterior work, the ALJ noted in her decision that the estimate submitted into evidence by the Claimants was found to be reasonable by the Claimants’ expert witness and that the Contractor “did not testify that the estimate was unreasonable.” *ALJ Recommended Decision* p. 9. As for the burden of proof, the ALJ states in the discussion section of her decision that “the Claimants have the burden of proving the validity of their claim by a preponderance of the evidence.” *ALJ Recommended Decision* p. 7. Moreover, throughout her decision the ALJ repeatedly assessed the sufficiency of the evidence presented by the Claimants and made findings as to whether the Claimants met their burden, thus making it clear that the

burden of proof was placed squarely on the Claimants. *ALJ Recommended Decision* pp. 8, 15, 16-17.

Both parties were allowed the opportunity to present documentary evidence and testimony before the ALJ. The ALJ's decision is thorough, supported by substantial evidence in the record and correct as a matter of law. Therefore, this Panel does not find that the ALJ erred in her decision and will not overturn it on exceptions.

Having considered the parties' arguments, the documentary evidence contained in the record, and the ALJ's Recommended Decision, it is this 18th day of December 2017

ORDERED:

- A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED**; AND
- C. That the Recommended Decision and Order of the Administrative Law Judge is **AFFIRMED**;
- D. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Andrew Snyder
Chairperson –Panel B
Maryland Home Improvement
Commission

IN THE MATTER OF THE CLAIM

OF MICHAEL AND LOUIS

GIACCHINO,

CLAIMANTS

AGAINST THE MARYLAND HOME

IMPROVEMENT GUARANTY FUND

FOR THE ALLEGED ACTS OR

OMISSIONS OF ISAAC BROWN,

T/A 3D RESIDENTIAL, LLC,

RESPONDENT

* BEFORE DEBORAH S. RICHARDSON,

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE

* OF ADMINISTRATIVE HEARINGS

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* OAH No.: DLR-HIC-02-16-25389

* MHIC No.: 16 (90) 812

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES

SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION

PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On June 8, 2016, Louis Giacchino and his son, Michael Giacchino (Claimants)¹ filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund

¹ Both Louis Giacchino and his son, Michael Giacchino, filed a claim with the Maryland Home Improvement Commission Guaranty Fund. The Hearing Order, which referred this matter to the Office of Administrative Hearings (OAH), inadvertently listed only Louis Giacchino as a Claimant. The Notice of Hearing sent by the OAH, in turn, listed only Louis Giacchino as the Claimant. As it is clear to me that both gentlemen jointly filed the original claim, jointly own the property at issue, and consider their interests to be identical, I consider them both Claimants.

(Fund) for reimbursement of \$20,563.00² in alleged actual losses suffered as a result of a home improvement contract with Isaac Brown, trading as 3D Residential, LLC (Respondent).³

I held a hearing on February 27, 2017 at the Largo Government Center in Largo, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself. Chris King and Andrew Brouwer, Assistant Attorneys General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent represented himself.

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 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; 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 - Claim Package, consisting of:
- Claim Summary dated February 26, 2017 for \$16,928.00
 - Email from Mike Venable to Claimant Louis Giacchino, July 23, 2015
 - Estimate from Annapolis Custom Painting, May 20, 2015
 - Proposal from Loukata Painting, May 15, 2015
 - Proposal from Rite-Way Painting, Inc., date obscured

² The Claimants modified this Claim at the hearing, alleging losses in the amount of \$16,928.00.

³ The Claimants wrote "3D Design & Remodeling" on the Claim Form, because that name appeared on the Contract entered into by the parties. The Fund presented evidence that Mr. Brown is actually licensed as "3D Residential, LLC," (Fund Ex. 4), and the Hearing Order identified the alleged responsible Contractor as Isaac Brown t/a 3D Residential, LLC. Mr. Brown made no objection at the hearing or otherwise to this identification of the Respondent.

- Proposal from Elegant Floor Service, May 28, 2015
- Estimate from Thompson Creek Window Company, April 9, 2015
- Estimate from Windows Plus, LLC, June 5, 2015
- Estimate from 3D Design & Remodeling, LLC, May 24, 2014
- Surveyor's certification, November 14, 2002
- Check from Claimant Louis Giacchino to Respondent, May 26, 2014
- Summary of payments from Claimants to Respondent, dates ranging from May 26, 2014 to March 18, 2015
- Photographs, May 2016
- Home Inspection Report, April 7, 2016

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Hearing Order, August 11, 2016
- Fund Ex. 2 - Notice of Hearing, October 19, 2016
- Fund Ex. 3 - Corrected Notice of Hearing, January 31, 2017
- Fund Ex. 4 - Department of Labor, Licensing & Regulation I.D. Registration, January 30, 2017
- Fund Ex. 5 - Home Improvement Claim Form, June 8, 2016
- Fund Ex. 6 - Letter from MHIC to Respondent, June 30, 2016
- Fund Ex. 7 - Letter from MHIC To Whom It May Concern, February 22, 2017
- Fund Ex. 8 - Memorandum from Naterra Bailey, Maryland State Board of Master Electricians To Whom It May Concern, February 23, 2017
- Fund Ex. 9 - Memorandum from Heidi Stearlings, Permits Supervisor, Prince George's County Government, Department of Permitting, Inspections and Enforcement, To Whom It May Concern, February 23, 2017

I did not admit any exhibits into evidence on the Respondent's behalf.

Testimony

The Claimants both testified in their own behalf and presented the testimony of Gary Christopher, who was accepted as an expert in home inspections.

The Respondent testified in his own behalf.

The Fund did not present 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 matter of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 124418.

2. The Claimants are the owners of a single-family home located on Montgomery Road in Beltsville, Maryland (Property).

3. On March 26, 2014, the Claimants and the Respondent entered into a contract (Contract) to add a 1,050 square foot second level addition (Addition) to the existing home on the Property complete with a master bedroom suite with closet and master bath, two other bedrooms, a hall bathroom, storage and a laundry room.

4. The Contract included demolition of the existing roof and interior walls. The Addition involved the reconstruction of the roof and second floor of the house, including all exterior and interior framing, all plumbing and electrical work, insulation, roofing, siding, HVAC, doors and windows, drywall, moldings, interior and exterior painting, flooring, and bathroom fixtures.

5. Renovation of the home's already existing staircase was not included in the Contract.

6. The agreed-upon Contract price was \$160,000.00.

7. The Claimants timely paid the Contract in full in the following amounts and manner:

5/26/14	\$50,000.00	check
9/5/14	\$15,000.00	check
9/19/14	\$15,000.00	check
10/23/14	\$15,000.00	check

10/31/14	\$15,000.00	check
11/20/14	\$15,000.00	credit card
12/9/14	\$15,000.00	check
1/22/15	\$5,000.00	check
1/27/15	\$5,000.00	credit card
2/5/15	\$5,000.00	check
3/18/15	\$5,000.00	check

8. Work began soon after March 26, 2014.
9. The Respondent last appeared to perform work on or about March 15, 2015.
10. By March 15, 2015 and thereafter, the Respondent had not fulfilled the following

terms of the contract:

- a. The Respondent used pre-primed wood in the exterior portion of the Addition, including on the soffit, fascia and rakes, but did not paint the wood. The Respondent left the exterior wood with nail holes unpatched and with no caulking.
- b. The Respondent installed three windows in the addition (one in the laundry room and one in each bathroom) that were sealed and did not open.
- c. The Respondent cut into and damaged several walls and ceilings in the original portion of the house in order to run plumbing and electricity to the addition. The Respondent did not repair, patch or paint those damaged walls and ceiling.
- d. The Respondent damaged the Claimant's staircase and banister during construction under the Contract.

11. The Claimants had several conversations with the Respondent after March 15, 2015 about deficiencies in the construction under the Contract. The Respondent never accepted responsibility or offered to correct the problems. After the Respondent received notice of the Claim with the Fund, the Respondent offered a new contract to perform repair work for additional money.

12. The Claimants received an estimate for \$1,900.00 from Rite-Way Painting, Inc. to patch and paint the interior portions of the house damaged by the Respondent during the plumbing and electrical work.

13. On April 9, 2015, the Claimants received an estimate for \$2,878.00 from Thompson Creek Window Company to install three windows that open in the Addition.

14. On May 20, 2015, the Claimants received an estimate for \$7,850.00 from Annapolis Custom Painting & Multi Home Improvement, Inc. to complete the exterior painting of the Addition.

15. In July 2015, the Claimants paid \$1,700.00 to Mike Venable, The Electrical Medic, to install a fan in the master bathroom, add attic venting, and vent a plumbing stack through the roof. Mike Venable is not a licensed Maryland contractor.

16. The Claimants actual loss is \$12,628.00

DISCUSSION

The Claimants contend that the Respondent performed an unworkmanlike, inadequate, and incomplete home improvement when he added to their existing home a 1,050 square foot second level addition including a master bedroom suite with closet and master bath, two additional bedrooms, a hall bath, storage and a laundry room. Specifically, the Claimants allege the following:

- Improper venting – new bathrooms not vented through the roof, attic not adequately vented to accommodate second floor heat pump, no vent fan installed

in master bathroom, plumbing stack was removed from the side of the house causing sewage odors

- Exterior wood was not primed or painted, joints were not caulked, end cuts show raw wood, soffits and rake boards and wood band around house have hundreds of uncaulked nail holes
- Interior patching, painting and drywall repair not completed – dining room and kitchen beneath the addition left unfinished after new plumbing was routed through those areas, molding never replaced, sections of ceiling in both bedrooms beneath the addition have chunks of plaster missing, unfinished sections of drywall left in the basement stairwell and walls where plumbing and electric was routed
- Already existing stairwell from living room to new addition was damaged by contractors, attempted repair left staircase in worse condition, stairwell banister not properly installed, banister built using two different species of wood
- Three windows installed in the addition did not open
- Closet shelves not properly installed
- Doorframes left uneven and cut short leaving large gaps

In this case, the Claimants have the burden of proving the validity of their 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)).

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);⁴ *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a

⁴ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

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.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimants. There are no prima facie impediments barring the Claimants from recovering from the Fund (ownership of more than three homes, being related to the respondent/contractor, refusing to adhere to an arbitration clause in the contract, etc.). Bus. Reg. § 8-405(c) and (f). For the following reasons, I find that the Claimants have proven eligibility for compensation regarding some of their claims.

Exterior Caulking and Painting

The Contract provided that “[a]ll new woodwork to be wood puttied, caulked, sanded and primed prior to painting;” and that “[a]ll woodwork and trim to be painted using two topcoats of Valspar latex semi-gloss enamel in color selected by customer.” (Clmt. Ex. 1). The Claimants allege that the Respondent used pre-primed wood on the exterior of the addition but did not paint the wood, patch or caulk. They argue that the wood is peeling and there are hundreds of exposed nail holes. Gary Christopher, accepted as an expert in home inspections, confirmed that the Respondent used pre-primed wood for the exterior portion of the addition, including on the soffit, fascia and rakes, but did not paint the wood. He also confirmed the Respondent left the exterior wood with nail holes unpatched and no caulking.

The Respondent testified that the exterior wood was pre-primed and painted. Moreover, he testified that there must be paint on the wood, as the Claimants allege the paint is peeling.

The Claimants testimony, along with the testimony of their expert, and pictures of the unpainted wood, establish by a preponderance of the evidence that the exterior of the Addition was not painted by the Respondent. The fact that the paint was peeling is not inconsistent with

the Claimants' allegation. Instead, it means that the primer, rather than a top coat of paint, was peeling. As the Contract plainly provided for the exterior woodwork to be painted, the Respondent provided an inadequate and incomplete home improvement in this regard.

The Fund suggests that the Claimants' estimate, provided by a licensed contractor, to do the exterior painting and caulking for \$7,850.00 is an appropriate measure of damages on this issue. I agree. Mr. Christopher testified that this was a reasonable estimate to paint and caulk the exterior of the Addition. The Respondent did not testify that the estimate was unreasonable. And moreover, the estimate only concerns remediating the Respondent's defective exterior painting and caulking work and does not include any of the wood that was part of the original house structure.

Windows

The Contract provides that "[a]ll windows to be 'Anderson 200 series' insulated clad units." (Clmt. Ex. 1). The Claimants testified that they understood that all windows would open and none would be sealed shut. When the Respondent installed three windows that were sealed shut (one in the laundry room and one in each bathroom), the Claimants brought this discrepancy to the Respondent's attention. The Claimants testified that the Respondent acknowledged that he had ordered the wrong windows and he would replace them. The Respondent testified the windows he installed were Anderson 200 series but the building code required that windows within 18 inches of a tub deck had to be sealed. The Claimants acknowledge that the Respondent claimed that a window that opened would not pass code, but that he agreed to replace the windows after the work passed inspection.

The Respondent testified he met with the Claimants and an architect three times to go over plans for the Addition. He said that all of the details for the Addition, including whether the windows can open or are sealed shut are included in architectural drawings, which is part of the

Contract. The Contract provides that the scope of work is to “[a]dd a 1,050 square foot second level to existing structure complete with a master bedroom suite with closet and master bath, 2 other bedrooms, a hall bath, storage, and laundry room *per plans*.” (Clmt. Ex. 1) (emphasis added). However, neither party provided me with a copy of the plans. The Respondent also did not provide me with a citation to the section of the building code he claims is controlling in this case. In the absence any probative evidence to the contrary, I am left with the Claimants’ unequivocal assertion that they expected windows that could be opened, and an ambiguous contract, which provides only that the windows are to be “Anderson 200 series” but makes no mention of whether they could be opened.

The Court of Appeals has held, “it is a basic principle of contract law that, in construing the language of a contract, ambiguities are resolved against the draftsman of the instrument.” *John L. Mattingly Constr. Co. v. Hartford Underwriters Ins. Co.*, 415 Md. 313, 327 (2010) (quoting *Burroughs Corp. v. Chesapeake Petroleum & Supply Co., Inc.*, 282 Md. 406, 411 (1978)). Since all parties agree the Respondent was the drafter of the Contract, and the meaning of the disputed text is ambiguous, it is proper to interpret the disputed language against the Respondent’s interests.

In addition, “[w]hen a provision in a contract is susceptible to more than one interpretation, a construction which makes the contract fair and reasonable will be preferred to one which leads to either a harsh or unreasonable result.” *P.V. Properties, Inc. v. Rock Creek Village Associates Ltd. Partnership*, 77 Md. App. 77, 83 (1988) (ambiguous terms in contract between landlord and tenant would be interpreted to make the contract fair and reasonable as the law implied an obligation to act in good faith and to deal fairly with the other party) (citing *Canaras v. Life Truck Services, Inc.*, 272 Md. 337 (1974); *Baltimore City v. Industrial Electronics, Inc.*, 230 Md. 224 (1962); *Stanbalt Realty Co. v. Commercial Credit Corp.*, 42 Md.

App. 538 (1979)). Under this canon, the fair and reasonable outcome of the contract interpretation is that the Claimants should have received the windows they believed they had contracted for. Windows that open are the norm, and it would be expected that windows that are sealed shut would be specifically mentioned in a contract. Failure to provide the agreed upon windows is an inadequate home improvement.

Given the ambiguity in the contract and the fact that it was drafted by the Respondent, the Fund suggests that \$2,878.00, an estimate the Claimants received to replace the three windows, is an appropriate measure of damages on this issue. I agree. The Claimants received an estimate for a significantly larger sum to replace the three windows but used the lower estimate in their claim. Moreover, the Respondent did not testify that this estimate was unreasonable.

Interior Painting and Patching

The Claimants testified that the Respondent cut into and damaged several walls and ceilings in the original portion of the house in order to run plumbing and electricity to the addition. Indeed, the Claimants provided pictures of extremely unsightly walls and ceilings in the dining room, kitchen and living room. In addition, the Claimants allege that the Respondent did not properly patch and paint some parts of the Addition, including in the new closets.

As to the Addition, the Respondent claims that he completed everything that was required of him under the contract. Regarding the original portion of the house, the Respondent argued that painting and patching on the original two floors of the house were not included in the contract.

There is nothing in the Contract that specifically obligates the Respondent to repair walls and ceilings damaged during construction. The Contract does, however, specify that the Respondent would provide all plumbing and electricity to the Addition. It is perfectly reasonable to anticipate the Respondent would need to access already existing plumbing and electrical lines

elsewhere in the house in order to complete the plumbing and electrical work in the addition. Mr. Christopher testified he would expect a contract for an addition of this size to include repair to walls directly damaged in order to provide plumbing and electricity to the addition.

Again, I find the contract on this issue ambiguous. I agree with the Fund's recommendation that the terms of the contract, drafted by the Respondent, be construed against the Respondent. As a result, the contract terms requiring the Respondent to install plumbing and electrical work and to connect those utilities through the existing systems requires that the Respondent repair any damage caused by the connection. The failure to paint and patch the damaged walls and ceiling is an unworkmanlike, inadequate and incomplete home improvement. For that reason, I also agree with the Fund's recommendation that the Claimant's estimate for \$1,900.00 to complete the interior patching and painting of walls and ceilings in the house be used for purposes of a damage calculation.

Restoration of Staircase

The Claimants argue that the staircase, original to the house, was damaged during the reconstruction of the second floor addition. The Claimants obtained an estimate for \$950.00 for restoration of the staircase, including sanding, stain and DuraSeal finish from Elegant Floor Service. The Respondent argues that the staircase was part of the original house, he did his best to protect it during the construction, and in any event is not part of the Contract. The Fund opposes any award for restoration of the staircase, arguing that it constitutes consequential damages. Because I agree with the Fund's argument, it is not necessary for me to determine whether damage to the staircase constituted unworkmanlike home improvement.

A claim against the Fund has limitations. A claim against the Fund for an actual loss cannot include consequential damages. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1)(a). Although neither the statute nor the regulations governing the Fund define "consequential

damages,” the law provides that an award from the Fund is allowable only to reimburse a homeowner for the cost of “restoration, repair, replacement, or completion” of a substandard or unfinished home improvement job. Bus. Reg. § 8-401. Consequential damages are damages stemming from problems that arise as a consequence of poor performance and not the poor performance itself. See *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 411–13 (2012); see also *Black’s Law Dictionary* (10th ed. 2014) (“[l]osses that do not flow directly and immediately from an injurious act, but that result indirectly from the act”).

In this case, the Respondent was hired to add a second story addition onto an existing home. Unlike the plumbing and electrical work, which was required under the Contract, at no time was the Respondent hired to do anything with the existing staircase in the home. Even assuming that the Respondent damaged the staircase during the course of construction, the allowable reimbursable amounts from the Fund would be only for the costs of restoration, repair, replacement, or completion of the work done by the Respondent *to the Addition*. Damages to the staircase, even if they resulted from unworkmanlike, inadequate, or incomplete work on the roof, would be consequential damages. While the Claimants may have recourse against the Respondent in another venue, consequential damages are not reimbursable from the Fund. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1)(a).

Venting

The Claimants allege several problems with the venting and plumbing in the Addition. First, they allege that the bathrooms were not vented through the roof but left open in the attic causing foul odors and damage to the attic plywood ceiling. To rectify these problems, the Claimants hired an electrician, who added venting through the roof with vent caps. The Claimants also allege the attic was inadequately vented to accommodate the second floor heat pump housed inside of it. To ameliorate this problem, the Claimants hired an electrician to install

attic venting fans. The Claimants also allege they had an electrician install a venting fan in the master bathroom where none had been installed. Finally, the Claimants allege that during construction the Respondent removed a plumbing stack from the side of the house which caused foul sewage odors around the exterior of the house. To rectify this problem, the Claimants' electrician added a new vent stack to sit above the roof line. The Claimants had all of these alleged deficiencies cured by Mike Venable, The Electrical Medic, for \$1,700.00.

The Claimants' expert witness did not view the Property with these defects in place, the Claimants already having contracted to have them repaired. However, Mr. Christopher agreed that if the information he received from the Claimants was correct, it would be unworkmanlike or incomplete. The Respondent testified that everything was vented properly, both according to the Contract and to the code.

It is unnecessary for me to address whether the venting complained of by the Claimants was within the scope of the Contract or was performed inadequately or in an unworkmanlike manner, because the Claimants resorted to a remedy that is not compensable by the Fund. The Fund presented evidence that Mr. Venable is not a licensed contractor, with either the MHIC or with Prince George's County. The Claimants were unable to present anything to the contrary or to suggest Mr. Venable is a licensed electrician. The Fund contends that it is a policy of the MHIC to not provide reimbursement to homeowners who hire unlicensed contractors to correct or complete work performed that is the subject of a claim against the Fund.⁵

The burden of proof to establish an actual loss, including the amount of the loss, lies with the Claimant. COMAR 09.08.03.03A(3). Without some proof that Mr. Venable was licensed by

⁵ See <https://www.dllr.state.md.us/license/mhic/mhicfaqgf.shtml#costs>. (The MHIC may dismiss any claim that is frivolous, legally insufficient or made in bad faith. These include claims: based upon a false or altered document; a document, bill, receipt or estimate that includes an enhancement, improvement, upgraded services or materials or work or repairs that are outside the scope of the original contract; and work completed by an unlicensed contractor.) Last visited on May 5, 2017.

the MHIC, I must agree with the Fund that the cost of any work performed by him is not compensable by the Fund. The MHIC policy is designed to encourage home improvement contractors to be licensed and to discourage homeowners from using unlicensed contractors. The MHIC's policy is reflected in a number of ways. To begin, a homeowner may recover compensation from the Fund for an actual loss resulting from an act or omission by a *licensed* contractor. Bus. Reg. §§ 8-401, 8-405(a). In other words, if the Respondent was not licensed by the MHIC, the Claimants would have been barred from asserting their claim against the Fund. Likewise, if the Respondent was unlicensed when he performed the work, he would have committed a misdemeanor crime and be subject to a fine of \$1,000 or imprisonment not exceeding six months or both, for a first offense. Bus. Reg. § 8-601 (Supp. 2016). Additionally, Maryland appellate decisions offer some guidance on the treatment of unlicensed home improvement contractors. Because the Maryland home improvement law was enacted for the protection of the public and mandates a licensing system to encourage contractors to be licensed and to discourage homeowners from using unlicensed home improvement contractors, the courts, as a matter of public policy, will not enforce contracts made by or with unlicensed contractors. *Fosler v. Panoramic Design, Ltd.*, 376 Md. 118 (1997) (homeowner can repudiate a contract made with a consultant if the consultant is performing a home improvement without a license); *Harry Berenter, Inc. v. Berman*, 258 Md. 290 (1970) (unlicensed home improvement contractor cannot enforce a mechanic's lien against a homeowner); *Baltimore Street Builders v. Stewart*, 186 Md. App. 684 (2009) (an unlicensed contractor cannot enforce a home improvement contract with a homeowner).

Because the Claimant has not demonstrated that Mr. Venable was licensed by the MHIC when he performed the venting work for the Claimants, as required by MHIC policy, any money

paid to him is not compensable by the Fund. Therefore, I will not consider the \$1,700.00 paid to Mike Venable during the calculation of any award from the Fund.

Labor Costs to Reinstall Closet Shelves, Secure Staircase Banister, and Door Trimming

The Claimants allege unworkmanlike home improvement by the Respondent in that he installed substandard closet shelves and improperly trimmed doors to accommodate the new carpet installation. Moreover, the Respondent installed a new staircase banister to respond to the Claimants' complaints about the damage caused during construction. The Claimants allege that the new banister was unsightly and poorly installed.

The Respondent counters that he installed metal shelves in the closet and that the Claimants were upset he did not install wood shelves, although this was not included in the Contract. Moreover, he contends that the doors were trimmed properly originally, but that the Claimants requested the Contract be changed midway through construction to provide carpet rather than hardwood flooring, altering the ideal measurement of the doors.

Again, I am not required to determine whether these items were within the scope of the Contract or were provided in an unworkmanlike manner, because the Claimants under any circumstances would not be entitled to reimbursement for these amounts. Claimant Michael Giacchino purchased new shelving for the closets himself, but provided me with no receipts or pictures of the new shelves. He also testified that he took down the doors and trimmed them himself. The \$1,650.00 he requested for these items is his estimate of the labor involved in this project. When asked by the Fund how he came up with that number, he responded that he "just put a number on it." In the absence of any documentation on the materials purchased, pictures to support their installation, or a reasonable explanation of the labor costs alleged by the Claimants, I find this request entirely speculative. Even if I found the home improvement in this respect

unworkmanlike, the Claimants have not shown their actual damages by a preponderance of the evidence. The Fund recommends against a reward on this issue and I agree.

Amount of Award

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). 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). Applying this formula and the damage items discussed above, I calculate the award as follows:

	\$160,000.00	-	Claimant paid under original contract
+	\$7,850.00	-	exterior caulking and painting
+	\$1,900.00	-	interior patching and painting
+	\$2,878.00	-	windows
=	\$172,628.00		
-	\$160,000.00	-	original contract amount
=	\$12,628.00		

IN THE MATTER OF THE CLAIM

* BEFORE DEBORAH S. RICHARDSON,

OF MICHAEL AND LOUIS

* AN ADMINISTRATIVE LAW JUDGE

GIACCHINO,

* OF THE MARYLAND OFFICE

CLAIMANTS

* OF ADMINISTRATIVE HEARINGS

AGAINST THE MARYLAND HOME

*

IMPROVEMENT GUARANTY FUND

*

FOR THE ALLEGED ACTS OR

*

OMISSIONS OF ISAAC BROWN,

* OAH No.: DLR-HIC-02-16-25389

T/A 3D RESIDENTIAL, LLC,

* MHIC No.: 16 (90) 812

RESPONDENT

*

* * * * *

FILE EXHIBIT LIST

I admitted the following exhibits on the Claimants' behalf:

Clmt. Ex. 1 - Claim Package, consisting of:

- Claim Summary dated February 26, 2017 for \$16,928.00
- Email from Mike Venable to Claimant Louis Giacchino, July 23, 2015
- Estimate from Annapolis Custom Painting, May 20, 2015
- Proposal from Loukata Painting, May 15, 2015
- Proposal from Rite-Way Painting, Inc., date obscured
- Proposal from Elegant Floor Service, May 28, 2015
- Estimate from Thompson Creek Window Company, April 9, 2015
- Estimate from Windows Plus, LLC, June 5, 2015
- Estimate from 3D Design & Remodeling, LLC, May 24, 2014
- Surveyor's certification, November 14, 2002
- Check from Claimant Louis Giacchino to Respondent, May 26, 2014
- Summary of payments from Claimants to Respondent, dates ranging from May 26, 2014 to March 18, 2015
- Photographs, May 2016
- Home Inspection Report, April 7, 2016

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Hearing Order, August 11, 2016

- Fund Ex. 2 - Notice of Hearing, October 19, 2016
- Fund Ex. 3 - Corrected Notice of Hearing, January 31, 2017
- Fund Ex. 4 - Department of Labor, Licensing & Regulation I.D. Registration, January 30, 2017
- Fund Ex. 5 - Home Improvement Claim Form, June 8, 2016
- Fund Ex. 6 - Letter from MHIC to Respondent, June 30, 2016
- Fund Ex. 7 - Letter from MHIC To Whom It May Concern, February 22, 2017
- Fund Ex. 8 - Memorandum from Naterra Bailey, Maryland State Board of Master Electricians To Whom It May Concern, February 23, 2017
- Fund Ex. 9 - Memorandum from Heidi Stearlings, Permits Supervisor, Prince George's County Government, Department of Permitting, Inspections and Enforcement, To Whom It May Concern, February 23, 2017

I did not admit any exhibits into evidence on the Respondent's behalf.

PROPOSED ORDER

WHEREFORE, this 8th day of June, 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