

**IN THE MATTER OF THE CLAIM
OF MITCHELL PEREMEL,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF ELLIS BALDWIN,
T/A BALDWIN PAINTING,
RESPONDENT**

*** BEFORE WILLIS GUNTHER BAKER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-17-09217
* MHIC No.: 17 (90) 31**

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PROPOSED DECISION

**STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On October 2, 2016, Mitchell Peremel (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$2,850.00 in actual losses allegedly suffered as a result of a home improvement contract with Ellis Baldwin, trading as Baldwin Painting (Respondent).

I held a hearing on November 30, 2017 at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). The Claimant represented himself. Andrew Brouwer, Assistant Attorney General, Department of

Labor, Licensing, and Regulation (Department), represented the Fund. Michael May, 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 in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); Code of Maryland Regulations (COMAR) 09.01.03; 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 amount, if any, is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf:

- Cl. Ex. 1 - Baldwin Painting Estimate, dated May 14 [no year]
- Cl. Ex. 2 - Copy of cleared check showing payment to Baldwin Painters dated May 28, 2014
- Cl. Ex. 3 - Photograph of Claimant's deck from 2015 or 2016¹
- Cl. Ex. 4 - Photograph of Claimant's deck from 2015 or 2016
- Cl. Ex. 6 - Photograph of Claimant's deck from 2015 or 2016
- Cl. Ex. 7 - Photograph of deck being stripped in 2016
- Cl. Ex. 8 - Photograph of Claimant's garage floor from 2015 or 2016
- Cl. Ex. 9 - Photograph of Claimant's garage floor from 2015 or 2016
- Cl. Ex. 10 - Photograph of Claimant's deck 2016

¹ Claimant testified that the Photographs identified in Cl. Ex. 3, 4, 6, 8 and 9 were taken in 2015 when introduced, but his later testimony was unclear as to whether they were taken in 2015 or 2016.

- Cl. Ex. 11 - Photograph of deck being stripped in 2016
- Cl. Ex. 12 - Photograph of new stain being applied in 2016
- Cl. Ex. 13 - Photograph of deck being stripped in 2016
- Cl. Ex. 14 - Photograph of deck being stripped in 2016
- Cl. Ex. 15 - Photograph of deck in 2016, with old and new stain
- Cl. Ex. 16 - Certified Mail envelope from June 2016 and two Fedex envelopes from July 2016
- Cl. Ex. 17 - June 22, 2016 letter from Claimant to Respondent
- Cl. Ex. 18 - June 10, 2016 letter from Claimant to Respondent
- Cl. Ex. 19 - July 16, 2016 M.E. Gorleski, LLC Proposal
- Cl. Ex. 20 - Copy of Check dated July 30, 2017 from Claimant to M.E. Gorleski, LLC
- Cl. Ex. 21 - Text messages May 26, 2016 to June 8, 2016 between Claimant and Richard Baldwin

The Claimant also offered Cl. Ex. 5 - physical shavings of deck stain and peelings of garage floor and Cl. Ex. 22 - Text messages between the Claimant and Kevin Mowery which were not admitted.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - MHIC Hearing Order dated March 23, 2017
- Fund Ex. 2 - OAH Notice of Hearing
- Fund Ex. 3 - October 24, 2016 letter from MHIC to the Respondent, with attached Claim Form
- Fund Ex. 4 - Respondent's MHIC Licensure
- Fund Ex. 5 - Michael Gorleski's MHIC Licensure

The Respondent did not offer any exhibits.

Testimony

The Claimant testified on his own behalf and presented the testimony of Kevin Mowery.

The Respondent testified on his own behalf. The Fund offered no 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 01*8382.

2. On May 14, 2014, the Claimant and the Respondent entered into a contract to repair drywall damage and paint the ceiling and walls of the garage, power wash and paint the floor of the garage, power wash and paint the rear deck, and power wash and stain the concrete pool area.

3. The original agreed-upon contract price was \$3,500.00.

4. On May 28, 2014, the Claimant paid the Respondent \$3,500.00.

5. The original job was completed in May 2014.

6. In May of 2016, the Claimant contacted the Respondent to inform him that in some areas of the rear deck, the paint was flaking and loose. The Respondent met the Claimant at the home and agreed to repaint the deck.

7. The Respondent sent his son, Richard Baldwin, to oversee a crew at the Claimant's property to make the necessary repairs. The Respondent's workers power washed the deck and spent two days scraping and sanding the areas where the paint was flaking. The deck was then repainted with a new color chosen by the Claimant. The Respondent was supplied the paint for free by Sherwin Williams and did not charge the Claimant any additional fee for repainting the entire deck.

8. Sherwin Williams provided the new paint for free because there had been some concern about the durability of the paint that had been used in 2014.

9. The Respondent provided no guarantee or warranty regarding how long the 2014 paint job on the deck would last.

10. The 2014 contract did not include stripping, scraping or sanding of the deck prior to painting.

11. The Claimant was unhappy with the color of the paint used in May 2016 and was also unhappy that the Respondent did not strip the deck down to the bare wood before repainting. The Claimant hired M.E. Gorleski, LLC, a licensed contractor, to scrape the deck surface to bare wood, prime the deck and apply two coats of stain to the deck at a cost of \$2,850.00.

12. The Claimant's actual loss is \$0.

DISCUSSION

In this case, 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)).

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

² Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume of the Maryland Annotated Code.

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 Claimant has not proven eligibility for compensation from the Fund.

The Claimant testified that he contracted with the Respondent in May of 2014 to have his deck and the floor of his garage painted. He claimed the deck began to peel in the Spring of 2015 and presented photographs of his deck and garage floor. He insisted that since they both began to peel in 2015, it was sufficient evidence to show that the Respondent did not perform the job in a workmanlike manner. He stated the paint should have lasted five years.

The Claimant stated he contacted the Respondent in 2015 to advise him of the peeling paint, but due to the Claimant’s health he did not follow up with the Respondent until 2016. The Respondent met with the Claimant at the property and agreed to repaint the deck. Due to his own health issues, the Respondent sent his son, Richard Baldwin, to oversee the paint job. The Claimant testified that he advised Richard Baldwin that he expected the paint to be rolled, not sprayed.

On cross examination, the Claimant acknowledged that the deck was a new build added to his house in 2012 and that by 2014 it needed to be re-stained. He denied having any experience with building or staining decks himself, but stated his expectation as a homeowner was that the paint job would last five years and that the Respondent should stand behind his work. He admitted that the contract did not contain any warranty or guarantee of how long the paint job would last. It was the Claimant’s position that the deck paint peeled because the Respondent had not properly prepped the surface prior to painting.

In June of 2016, the Claimant sent the Respondent two letters advising that he believed the job was “a mess” and not done properly and that the Claimant was hiring another contractor

to strip the deck and have it repainted. (Cl. Ex. 17 and 18). He requested that the Respondent return the original \$3,500.00 that was paid in 2014. (Cl. Ex. 17 and 18). The Claimant testified that he had to hire a new contractor, M.E. Gorleski, to completely strip the deck down to the wood, prime and repaint it at a cost of \$2,850.00.

The Claimant offered the testimony of Kevin Mowery, a salesman with Sherwin William Paints, to support his argument that the Respondent should have scraped the entire deck to the bare board before painting it, which the Claimant alleged was in conformity with industry standards.³ However, Mr. Mowery did not provide such testimony, and in fact testified that the Respondent's workers did exactly what was recommended by only scraping the areas where the paint was peeling. Mr. Mowery also did not support the Claimant's assertion that paint should last for five years. Mr. Mowery testified that deck paint can last "maybe three years" subject to the area, traffic, and weather, and that Sherwin Williams does not warranty or guarantee as to the length of time paint will last. Mr. Mowery also offered that he was asked by the Claimant to come to the home in May 2016 after the Respondent's workers were finished at the property and that he did not observe any peeling paint at that time. He stated that the Claimant asked him to come out to test the color because the Claimant was concerned about the color and wanted the paint to be darker.

The Respondent testified the Claimant did not contact him in 2015 about peeling paint. When the Claimant called him in May of 2016, the Respondent agreed to meet the Claimant at the house. The Respondent noted there were "spots" of peeling paint throughout the deck. The Respondent contacted Sherwin Williams and they agreed to supply new paint, so the Respondent agreed to repaint the deck. He sent his son Richard with a crew who spent four days at the

³ The Claimant attempted to offer Kevin Mowery as an expert in paint application, but he failed to establish any training or practical experience that would qualify Mr. Mowery as an expert witness.

Claimant's house. Two days involved scraping and sanding areas that were peeling, which was not part of the original contract. When the job was almost complete and only two steps remained, the Claimant called the Respondent's son to tell him he did not like the "Black Magic" color that had been used and he wanted it darker. The Respondent's son completed the job with the "Black Magic" paint and did not return to the Claimant's property.

The Fund conceded it was appropriate for the claim to be considered on the merits. However, the Fund argued that the Claimant failed to demonstrate a causal connection between the actions of the Respondent and the peeling paint and that no expert testimony was presented to demonstrate inadequate or unworkmanlike performance of the contract, thereby making the Claimant ineligible for compensation from the Fund.

The evidence shows the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. However, the evidence fails to demonstrate the Respondent performed unworkmanlike, inadequate or incomplete home improvements. The Claimant provided no expert testimony and failed to provide any evidence to show that the Respondent breached the standard of care or performed in an unworkmanlike manner. In fact, the opposite was true.

The original contract called for power washing and painting of the deck.⁴ It never envisioned that the deck was to be stripped or sanded prior to the paint application. There was simply no reason for the Claimant to expect the Respondent to strip the deck at either time he painted it and there is no evidence that stripping and sanding of the deck before painting was the industry standard. The Respondent came back to the Claimant's property two years after the initial paint job and re-painted the Claimant's deck at no charge, despite being under no

⁴ The original contract had other items including drywall and painting in the garage and staining the pool deck. The Claimant argued that the garage floor was peeling as well, but offered no substantive evidence regarding the garage.

obligation to do so, in order to appease the Claimant. In an abundance of professionalism, the Respondent scraped and sanded the peeling spots that were encountered in 2016 prior to re-painting, again at no cost to the Claimant.

There was no evidence presented to show the deck began peeling in 2016 after the Respondent re-painted it. The evidence showed that the Claimant was unhappy with the color of the paint and complained, but at that point, almost the entire re-paint had been completed and the Respondent chose to complete the job and walk away. The evidence showed that the Claimant paid another contractor to strip the paint that the Respondent had just applied because he was unhappy with the color, not because the Respondent had performed the work poorly. Therefore, I find that the Claimant is not eligible for an award from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts and omissions and is not entitled to an award from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(2).

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.

Signature on File

January 8, 2018
Date Decision Issued



Willis Gunther Baker
Administrative Law Judge

WGB/cj
#171101

PROPOSED ORDER

WHEREFORE, this 2nd day of February, 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.

Andrew Snyder

Andrew Snyder

Panel B

MARYLAND HOME IMPROVEMENT COMMISSION