

**The Maryland Home
Improvement Commission**

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**BEFORE THE
MARYLAND HOME IMPROVEMENT
COMMISSION**

**v. Samuel B. Purll, Jr.
t/a District Builders of Soluthern
Maryland, LLC
(Contractor)
and the Claim of
John R. Pasquini
(Claimant)**

MHIC No.: 12 (75) 935

FINAL ORDER

WHEREFORE, this July 15, 2014, Panel B of the Maryland Home Improvement

Commission ORDERS that:

- 1. The Findings of Fact set forth in the Proposed Order dated November 26, 2013 are AFFIRMED.**
- 2. The Conclusions of Law set forth in the Proposed Order dated November 26, 2013 are AFFIRMED.**
- 3. The Proposed Order dated November 26, 2013 is AFFIRMED.**
- 4. This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**

Joseph Tunney
**Joseph Tunney, Chairperson
PANEL B**

MARYLAND HOME IMPROVEMENT COMMISSION

IN THE MATTER OF THE CLAIM	* BEFORE DANIEL ANDREWS,
OF JOHN PASQUINI,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-13-11421
FOR THE ALLEGED ACTS OR	* MHIC NO.: 12 (75) 935
OMISSIONS OF	*
SAMUEL B. PURLL, JR. , T/A	*
DISTRICT BUILDERS OF	*
SOUTHERN MARYLAND,	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On September 4, 2012, John R. Pasquini (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of an actual loss allegedly suffered as a result of a home improvement contract with Samuel B. Purll, Jr. t/a District Builders of Southern Maryland (Respondent).

I held a hearing on July 15, 2013, at the St. Mary's County Library, 23250 Hollywood Road, Leonardtown, Maryland 20659. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 &

Supp. 2013). Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Office of Administrative Hearings (OAH) Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Cl. Ex. 1: Fixed Remolding Contract, dated September 28, 2011
- Cl. Ex. 2: Structural Damage Claim Policy and Building Estimate Summary Guide, dated October 22, 2011; Respondent's letter estimate for storm damaged home, dated September 27, 2011
- Cl. Ex. 3: Disbursement Check Voucher, dated October 17, 2011; Disbursement Check Voucher, dated November 1, 2011; Disbursement Check Voucher, dated December 1, 2011
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- Cl. Ex. 9: Photograph of stain on bedroom baseboard
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- Cl. Ex. 13: Photograph of master bedroom floor finish
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- Cl. Ex. 15: Master bathroom trim above door
- Cl. Ex. 16: Series of photographs of master bathroom
- A - Bathroom door without door knob
 - B - Trim around window
 - C - Toilet base
 - D - Air Register
 - E - Door jamb
- Cl. Ex. 17: Series of photographs of Kitchen
- A - Unfinished drywall
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 - F - Unfinished drywall
 - G - Bowing/swelling drywall
 - H - Drywall compound on floor
 - I - Drywall compound on floor
 - J - Drywall compound on floor

K - Buckets of compound left in kitchen

L - Drywall near ceiling cracked

M - Drywall near ceiling cracked

N - Wall not level or flush with adjoining wall

Cl. Ex. 18: Series of photographs of the Living Room

A - Stain on baseboard

B - Ceiling not painted and drywall installed improperly

C - Ceiling not painted and drywall installed improperly

D - Living room to bedrooms hallway

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A - Window trim not caulked or painted

B - Window trim not caulked or painted

C - Trim with dents

D - Window trim not caulked

E - Trim with dents

F - White paint on natural wood door

G - Wood paneling when wall should be drywall

H - Wood paneling when wall should be drywall

Cl. Ex. 20: Photograph of Basement Bedroom carpet damaged not replaced

Cl. Ex. 21: Photograph of Master Bedroom exterior wall

Cl. Ex. 22 Series of photographs of Foyer

A - Paint splatter on floor

B - Paint splatter on floor

C - Paint splatter on wall

Cl. Ex 23: Photograph of attic with no plywood clips or blocking

Cl. Ex. 24: Series of photographs of the outside of the house

A - Water leaking onto chimney

B - Soffits not level or at correct angle

C - No gutters

D - Chimney flashing not uniform

E - Damaged siding not repaired

F - Damaged siding not repaired

G - Gutter removed from car port

H - Gutter on ground

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J through N - Trash left in yard

Cl. Ex. 25: Email from Claimant to Respondent, dated December 29, 2011.

Cl. Ex. 26: Proposal by Trimworks Remodeling, Inc.

Cl. Ex. 27: List from Respondent regarding kitchen cabinets and doors, dated October 28, 2011, with attached quote from Lowe's to Claimant, dated October 18, 2011

Cl. Ex. 28: Fax cover sheet from Lowe's to Claimant with attached quote, dated January 3, 2012

Cl. Ex. 29: Photograph of shower insert

I admitted the following exhibits as evidence on the Respondent's behalf:

Resp. Ex. 1: Letter from Respondent to Claimant, dated January 6, 2012

Resp. Ex. 2: Letter from Marc H. Sliffman, Esq. to OAH, dated July 11, 2013.

I admitted the following exhibits as evidence on the Fund's behalf:

GF Ex. 1: Notice of Hearing, mailed on September 6, 2012

GF Ex. 2: Department Transmittal, with attached Hearing Order and Home Improvement Claim Form; Respondent's licensing history, January 17, 2013

- GF Ex. 3: MHIC Licensing History for Respondent
- GF Ex. 4: MHIC letter to Respondent, dated March 2, 2011, with attached Home Improvement Claim Form
- GF Ex. 5: Claimant letter to Respondent, dated April 12, 2012, with attached photocopied envelope and certificates of service
- GF Ex. 6: MHIC letter to Respondent, dated September 28, 2012, with envelope and certificate of service
- GF Ex. 7: MHIC Licensing History for Anthony Murphy t/a Trimworks

Testimony

The Claimant testified on his own behalf and presented the testimony of his wife, Sheila Pasquini. The Respondent testified on his own behalf. The Fund did not present any testimony.

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 numbers 01-22106 and 05-127758.
2. On or about August 27, 2011, the Claimant's home located in Mechanicsville, Maryland, suffered storm damage from a recent hurricane. As a result, the Claimant sought to have the damage repaired through his homeowner's insurance policy with State Farm Insurance (State Farm).
3. State Farm provided the Claimant with a detailed scope of damage repair and cost of repair. The total cost to repair all damage was \$48,500.00.
4. On September 28, 2011, the Claimant and Respondent entered into a home improvement contract (Contract). The Contract's scope of work included the State Farm scope of damage and cost of repair.

5. The Contract price was \$48,539.20 to be paid pursuant to the following payment schedule: \$14,561.73 upon signing of contract; \$9,707.84 upon complete roof install; \$9,707.84 after drywall painting; \$9,707.84 upon cabinet install; and \$4,853.90 upon completed project.

6. At some point, the Contract price was modified to \$45,000.00.

7. The Contract established that all work shall be completed in a workmanlike manner and comply with all applicable building codes and laws. Further, the Contract provided that the Respondent shall remove all construction debris and leave the project in a broom swept condition.

8. The Contract provided that work shall commence on October 3, 2011 and be completed by November 15, 2011. These dates were approximate dates and subject to change orders or unusual weather delays.

9. The Contract provided that any claim arising out of the Contract, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association.

10. The Respondent began work required under the Contract and completed a substantial portion of the work.

11. For work performed, the Respondent received a total payment of \$32,000.00 which includes the following:

- A payment of \$8,462.86 on October 17, 2011;
- A payment of \$11,537.14 on November 1, 2011; and
- A payment of \$12,000.00 on December 1, 2011.

12. By December 2011, the Claimant experienced issues with the Respondent's quality of work and ability to complete the home improvement contract.

13. In the kitchen, the Respondent failed to properly install drywall compound. In areas of the drywall, the Respondent did not apply drywall tape which caused cracks in the drywall. The Respondent left drywall compound splatter on the floor and did not clean up.

14. In the living room, the Respondent was sloppy in applying a poly-urethane finish on the floor by getting finish on baseboard trim. The ceiling was not painted and drywall was installed improperly.

15. In the basement, the Respondent did not paint or properly caulk trim. Some trim appeared to have dents caused by hammer strikes. The Respondent did not remove basement doors which were warped by storm damage to fix by re-sanding them true with a planer. The Respondent did not remove wood paneling and replace with drywall.

16. The basement bedroom had storm damaged carpet which was not replaced.

17. The master bedroom water damage required the Respondent to remove a wall and replace insulation which the Respondent did not do.

18. In the foyer, the Respondent left paint splatter on walls and floors.

19. In the attic, the Respondent did not use clips or blocks as required by code.

20. On the outside of the house, the Respondent improperly installed the roof and it now leaks.

21. The Respondent improperly installed soffits which are not level and are at an improper angle.

22. The Respondent did not install gutters when he was required to do so.

23. The flashing around the chimney is improperly installed

24. The Respondent was to repair siding damaged by the storm but did not.

25. The Respondent removed a gutter from a front car port when he was not required to do and left it on the ground.

26. The Respondent left a lot of construction debris and trash and failed to clean up as required.

27. Electrical wiring in the kitchen and downstairs was installed incorrectly.

28. On December 29, 2011, the Claimant sent an email to the Respondent complaining that, despite having made a recent \$12,000.00 payment, he considered the work performed thus far to be not complete or workmanlike. Specifically, the Claimant expressed concern about the carpet, cabinetry, and gutters not being ordered for installation and improperly performed electrical work. The Claimant warned the Respondent that he was going to hire a licensed electrician to inspect the work and bill the Respondent for the services. The Claimant also warned that should the Respondent fail to order the carpet, cabinets, and gutters by December 30, 2011, he will consider the project "paid-in-full, [and] work-complete."

29. After December 29, 2011, the Respondent did not return to the Claimant's home to finish any work required by the Contract.

30. On December 30, 2011, the Claimant terminated the Contract because the Respondent could not fulfill the Claimant's email demand since he had spent the money already.

31. On January 6, 2012, the Respondent issued a letter to the Claimant acknowledging that the Claimant intended to complete project on his own, but requested an opportunity to proceed with arbitration as required by the Contract.

32. On April 12, 2012, the Claimant issued a letter to the Respondent by certified-mail return-receipt requested. Through the letter, the Claimant informed the Respondent that he had made several attempts to contact the Respondent about their contract, without a response. The Claimant explained that work still needed to be done as soon as possible. The Claimant explained that if the Respondent did not respond within ten days of the letter then the Claimant would seek another contractor to complete the work.

33. The Claimant's letter of April 12, 2012 was returned to the Claimant as unclaimed.

34. On August 13, 2012, the Claimant obtained a proposal from Trimworks Remodeling Inc. (Trimworks) to complete the work not performed by the Respondent and to repair unworkmanlike work.

35. The proposal addressed drywall work, insulation, trim, paint, hardwood floors and steps, gutters and downspouts, roof blocking, chimney flashing, and cleaning.

36. To complete the work or repair any work, Trimworks provided an estimate of \$18,125.00.

37. On September 4, 2012, the Claimant submitted a claim with the MHIC.

38. On September 18, 2012, the MHIC mailed a copy of the Claimant's claim to the Respondent.

39. On September 28, 2012, the MHIC mailed a letter to the Respondent, by certified-mail, return receipt requested. The MHIC's letter informed the Respondent that it had information that the Respondent rejected or ignored good faith efforts by the Claimant to submit the dispute to arbitration. Through the letter, the MHIC advised the Respondent that unless the MHIC receives documentation that the Respondent agreed to submit the dispute to arbitration, the MHIC will consider the arbitration clause in the Contract to be waived. The MHIC required the Respondent to submit any documentation within twenty-one days of its letter.

40. The MHIC's letter of September 28, 2012, was returned as unclaimed.

41. The Claimant's actual loss is \$5,125.00

DISCUSSION

Preliminary Issues

Postponement

On July 11, 2013, through his attorney Marc H. Sliffman, Esq., the Respondent sought a postponement of this matter by faxing a letter request to the OAH. The Respondent's letter acknowledged that the postponement request was made less than five days before the hearing scheduled on July 15, 2013, but requested that it be deemed an emergency. The nature of the emergency was that the Appellant had been busy at work, was dealing with family health issues, and had a death of a parent in May. Additionally, counsel indicated that he had a conflict in his schedule and could not attend the hearing. On July 12, 2013, the OAH denied the Respondent's postponement request because it was untimely and the Respondent had plenty of time to obtain legal representation prior to the hearing date. COMAR 28.02.01.16.

COMAR 28.02.01.16 provides:

- A. Except as provided in § D of this regulation, a request for postponement shall be made in writing and filed not less than 5 days before the scheduled hearing.
- B. Documentation of the reasons for the postponement shall be required from the party making the request.
- C. A request for postponement shall be granted only if the party requesting the postponement establishes good cause for the postponement.
- D. Emergency Request for Postponement.
 - (1) For purposes of this section, "emergency" means a sudden, unforeseen occurrence requiring immediate attention which arises within 5 days of the hearing.
 - (2) In an emergency, a request for postponement may be made by telephone.
- E. When practicable, all parties to a proceeding shall be contacted before a ruling on a postponement request is made.

On April 2, 2013, the OAH notified the Respondent of the scheduled hearing on July 15, 2013. The Respondent's request for postponement was filed within five days of the hearing and

was untimely, further other than the reasons asserted in the letter there was no documentation supporting the request. Understandably the Respondent was busy managing his work and family issues, however, nothing in the record otherwise suggested that his issues were sudden and unforeseen occurrences requiring immediate attention and which arose within five days of the scheduled hearing date. At the hearing, the Respondent again asserted his request to postpone without any new information. For the same reasons discussed, I concluded that the Respondent's request to be insufficient and denied the request. COMAR 28.02.01.16.

Arbitration

A claimant who seeks compensation from the Fund shall file a claim with the MHIC. COMAR 09.08.03.02A. When a contract between a claimant and a contractor requires that all contract disputes be submitted to binding arbitration, the claimant shall either:

- (1) Submit their dispute to binding arbitration as required by the contract; or
- (2) Provide evidence to the Commission that the claimant has made good faith efforts to bring the dispute to binding arbitration which the contractor has either rejected or not responded to. The Commission shall then give the contractor written notice that, if the contractor does not agree to binding arbitration, the Commission will consider the compulsory arbitration clause to be void and process the claimant's claim pursuant to this chapter.

COMAR 09.08.03.02E.

The Contract in this matter contained a clause requiring the parties to participate in arbitration should a dispute arise, but the evidence is unclear as to whether the Respondent adequately communicated the demand for arbitration to the Claimant. According to the Respondent, on January 6, 2012, he notified the Claimant that he wanted to take the contract dispute to arbitration. However, on April 12, 2012, the Claimant sent a letter to the Respondent, by certified mail, indicating that work still needed to be done under the Contract and that the Respondent needed to communicate with him on whether he was going to finish the project or

not. Despite these two letters, there was no proof that the Claimant received the Respondent's January 6, 2012 letter, and the Claimant's letter to the Respondent was returned as unclaimed.

Whether or not the Respondent invoked the arbitration clause is not the ultimate issue but whether he waived it by not responding to the MHIC. On September 28, 2012, the MHIC sent a letter to the Respondent, by certified mail, indicating that the MHIC had evidence that the Respondent ignored a request for arbitration. This letter may have misstated the circumstances, but it is clear that the MHIC requested the Respondent to present documentation that he wanted to proceed with arbitration; otherwise, the MHIC would consider the arbitration clause to be waived. Consistent with the lack of communication between the parties, the Respondent never responded to the MHIC letter and it was returned to the MHIC as being unclaimed by the Respondent.

Based on the evidence before me, I find that the MHIC gave the Respondent written notice that he must provide proof that he wanted to pursue arbitration but the Respondent failed to do so. For this reason, the MHIC properly determined that the Contract's arbitration clause was rendered void and the Claimant's claim against the Fund may proceed. COMAR 09.08.03.02E.

Actual Loss

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) (Supp. 2013). *See also* COMAR 09.08.03.03B(2). Actual 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 (2010). For the following reasons, I find that the Claimants have proven their eligibility for compensation.

The evidence, including the Claimant's testimony and photographs, depicted the Respondent's work as sloppy and incomplete. The Respondent did not seriously contest this issue except to state that had the Claimant allowed him to finish, then all work would have been done properly and completely. Nevertheless, after December 29, 2011, the Respondent did not return to work and did not finish the Contract. As of April 12, 2012, through certified mail, the Claimant's attempted to communicate a need for the Respondent to return to work but that letter was left unclaimed by the Respondent.

Throughout the hearing, it was apparent that the relationship between the parties deteriorated when the project took much longer than agreed, there were issues with workmanship, and it appeared that the Respondent was struggling to finish the project even with the monies already paid. By December 1, 2011, the Respondent was paid a total of \$32,000.00 out of the \$45,000.00 contract price, yet he needed more money to order carpet and cabinetry. In essence, this case is more about leaving a home improvement contract incomplete than performing an unworkmanlike home improvement.

In order to complete the Contract, the Claimant obtained a proposal from Trimworks. The Trimworks proposal did not contain anything that was not included in the original contract with the Respondent. In order to complete the Contract and repair any necessary work, the total cost proposed by Trimworks was \$18,125.00. I find the Trimworks proposal reasonable because it included the \$12,000.00 the Respondent was to be paid to complete the contract and the balance of \$6,125.00 does not seem inflated when compared with the amount of poor work performed by the Respondent as demonstrated by the Claimant's photographs.

Based on the evidence presented, the Claimant met his burden of proof and established that he suffered an actual loss actual loss from an act or omission by the Respondent, a licensed MHIC contractor. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2013). *See also* COMAR

09.08.03.03B(2). The Claimants' actual loss arose because the Respondent failed to complete the Claimants' home improvement. Md. Code Ann., Bus. Reg. § 8-401 (2010).

I now turn to the amount of the award, if any. 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 offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement 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.

COMAR 09.08.03.03B(3)(c).

The Claimant established that the original contract price, as eventually agreed upon by the parties, was \$45,000.00 and the Respondent was paid a total of \$32,000.00 for work performed. The Claimant established that another contractor, Trimworks, required \$18,125.00 in order to complete the original contract and repair any necessary work. Based on these values, the Claimant's actual loss is calculated as follows:

Amounts paid under the original contract	\$32,000.00
Plus amount to be paid to Trimworks	<u>\$18,125.00</u>
	\$50,125.00
Minus the original contract price	<u>\$45,000.00</u>
Actual Loss Value	\$ 5,125.00

As a result, under COMAR 09.08.03.03B(3)(c), the Claimant's actual loss is \$5,125.00.

CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual/compensable loss of \$5,125.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$5,125.00; and

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 at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

October 15, 2013
Date Decision Mailed

Daniel Andrews
Administrative Law Judge

DA/kkc
145531

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OF JOHN PASQUINI,	* AN ADMINISTRATIVE LAW JUDGE
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GF Ex. 7: MHIC Licensing History for Anthony Murphy t/a Trimworks

PROPOSED ORDER

WHEREFORE, this 26th day of November 2013, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision 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.

W. Bruce Quackenbush, Jr.

*W. Bruce Quackenbush, Jr.
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION