

IN THE MATTER OF THE CLAIM  
OF TERESA D. PEARCE AND  
ANTHONY FRIELER,<sup>1</sup>  
CLAIMANTS,  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF CARLTON  
WAINWRIGHT t/a HOMETECH  
CONTRACTING, INC.  
RESPONDENT

\* BEFORE STUART G. BRESLOW,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH NO.: DLR-HIC-02-13-43693  
\* MHIC NO.: 13(05)142  
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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On February 28, 2013, Teresa D. Pearce (Claimant)<sup>2</sup> filed a claim with the Maryland

~~Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of actual~~

losses allegedly suffered as a result of a home improvement contract with Carlton Wainwright t/a Hometech Contracting, Inc. (Respondent).

<sup>1</sup>Anthony Frieler is the husband of Claimant Teresa Pearce. At the hearing, a request was made to add Anthony Frieler as an additional claimant. He was added without objection.

<sup>2</sup>Unless otherwise noted, any reference to "Claimant" shall refer to the Claimant Teresa D. Pearce.

I held a hearing on July 25, 2014 at the Office of Administrative Hearings (OAH), Kensington, Maryland. Md. Code Ann., Bus. Reg. § 8-312 (Supp. 2014) and § 8-407 (2010). Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimants represented themselves. The Respondent appeared and was represented by Bert W. Kapinus, Esq.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2014), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

### ISSUE

Did the Claimants 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 on the Claimant's behalf:

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|------------|--|
| Cl. Ex.1   | Unexecuted Contract, dated February 4, 2012  |
| Cl. Ex. 1A | Executed Contract, dated February 4, 2012 with attachments   |
| Cl. Ex. 2  | Email from Marlon (unknown last name) to Respondent, dated March 29, 2012 and forwarded to Claimant on the same date |
| Cl. Ex. 3  | Email from Claimant to Respondent with unexecuted change order, dated April 14, 2012                                 |
| Cl. Ex. 4  | Email from Respondent to Claimants, dated April 17, 2012 with attached revised Change Order                          |
| Cl. Ex. 5  | Email from Respondent to Claimant, dated May 2, 2013 with attached change order                                      |
| Cl. Ex. 6  | Unexecuted Change Order Agreement, Exhibit C, dated May 7, 2012  |

- Cl. Ex. 7            Email from Respondent to Claimant, dated May 8, 2012 with attachment
- Cl. Ex. 8            Email from Respondent to Claimant, dated October 3, 2012 with attachment
- Cl. Ex. 9            Claimant's estimate of the value of the work performed by Respondent along with attached copies of checks paid to Respondent totaling \$113,100.00
- Cl. Ex. 10           Listing of contracts and receipts to complete the work, undated
- Cl. Ex. 11           Summary of work to be performed under verbal contract between Claimants and Kery Construction along with copies of receipts, undated
- Cl. Ex. 12           Summary of a list of Materials with attached receipts to complete the project, undated
- Cl. Ex. 13           Summary of Materials paid for by Kery Construction and reimbursed by Claimants
- Cl. Ex. 14           Summary of amount paid to complete the job, undated

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

- Fund Ex. 1           Notice of Hearing, dated May 9, 2014
- Fund Ex. 2           Transmittal form with attached Home Improvement Claim and Hearing Order, dated February 11, 2013
- Fund Ex. 3           MHIC licensing history for Respondent, dated July 16, 2014
- Fund Ex. 4           Letter from John Borz, Chairman, MHIC, to Respondent, with attached MHIC Claim Form, dated March 4, 2013
- Fund Ex. 5           Letter from Joseph Tunney, Acting Chairman, MHIC, to Respondent, dated July 11, 2013 with attached amendment to claim.

The Respondent did not offer any documents into evidence.

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### Testimony

The Claimants testified in support of the Claim.

The Respondent testified and offered no other witnesses.

The Fund presented no witnesses.

## 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 home improvement contractor, licensed by the MHIC.
2. The Claimants own a house located at 3518 Raymoor Road, Kensington, Maryland (Property).
3. On February 4, 2012, the Claimants entered into a fixed price contract (Contract) with the Respondent (Cl. Ex. 1A) for the installation of a second story addition to their home located on the Property to include a master bedroom, two additional bedrooms, fire chimney extension, laundry room, master bath, hall bath, and exterior covered porch (Project).
4. The total cost of the Project was \$150,000.00. Of the total cost of the Project, the Claimants were allowed \$10,000.00 for purchasing master bathroom shower and tub wall tiles, grout, ceramic floor tiles, light fixtures, window blinds, toilets, tubs and fixtures, shower fittings, sinks and sink fixtures, cabinets, counter tops, hard wood flooring, roof shingles, windows, and ceiling fans. The Respondent was required under the Contract to install all of these items purchased by the Claimants.
5. The Respondent was to begin work on the Project on February 6, 2012 and complete the Project on April 30, 2012.
6. The Contract included a payment schedule that called for payment upon completion of certain tasks by the Respondent. The Claimants provided the Respondent with a check in the amount of \$19,000.00 upon the execution of the Contract in accordance with the payment schedule.
7. On March 12, 2012, a permit was issued for the Project.

8. There was one written change order for the Project agreed to by the parties involving rebuilding the front porch roofing and installing new second floor supports. This work was performed and full payment was issued to the Respondent in the amount of \$2,100.00.

9. The Claimants paid the Respondent \$111,000.00 for the work performed on the Project as of April 14, 2012. According to the payment schedule in the Contract, the amount paid should have covered work performed through item 10 of the schedule. The Respondent performed work through item 4 of the payment schedule along with partial work included in item 5 of the schedule.

10. As of April 23, 2012, the total amount paid by the Claimants to the Respondent was \$113,100.00 for the work performed by the Respondent on the Project which included the change order agreed to by the parties.

11. On April 14, 2012, the Respondent provided a change order to the Claimant in the amount of \$6,350.00. This change order was never accepted by the Claimant. The Claimant, upon receipt of the proposed change order, became concerned that the quote was inflated and resulted from work that was damaged due to the Respondent's errors. The Claimant requested a meeting to discuss the Contract and the remaining work to be performed as well as a breakdown of disbursements.

12. On May 1, 2012, the Respondent requested an additional \$18,000.00 which was given to him by check, with instructions from the Claimants not to cash the check until authorized by the Claimant. ~~The Claimant again requested a detailed listing of projected remaining costs on the~~ Project. No work on the Project was performed by the Respondent after May 1, 2012.

13. On May 2, 2012, the Respondent provided a proposed change order describing the cost of work to be done and including a total cost overage for the Project of \$12,500.00. This change order was never agreed to by the parties.

14. The Claimant was not satisfied with the breakdown of the costs provided by the Respondent and requested a more detailed summary, which the Respondent provided in another change order proposal, dated May 7, 2012. The Claimants were not satisfied with the latest breakdown of costs and requested another document to include an itemized list describing where the money the Claimants had already provided was spent towards completion of the Project.

15. A third cost report statement was provided by the Respondent on May 8, 2012 which was also unacceptable to the Claimants because it did not provide a cost breakdown of the money spent on the Project and the amount that needed to be spent to complete the Project. The parties met on or about May 8, 2012 to discuss this further, however, no further cost breakdown was provided by the Respondent at that time. The Claimants advised the Respondent that there would be no further disbursements until the Respondent provided the requested documentation.

16. The Respondent left the job site following the meeting on May 8, 2012 and did not return until after the Respondent filed a claim with the MHIC. The Respondent did return to the Property in October 2012 to fix a portion of the roof, at the request of the investigator for the MHIC, but performed no other work on the Project.

17. On or about May 9, 2012, the Claimants, having been previously informed by the Respondent that he would not continue with the Project until he was given additional compensation to complete the Project, entered into a verbal contract with Kery Construction to complete the Project. Kery Construction, a MHIC licensed contractor, was a subcontractor of the Respondent on the Project and was familiar with the scope of the Project.

18. The Claimants paid Kery Construction \$24,000.00 to complete the Project. The Claimants purchased most of the materials for Kery Construction to use on the Project. The total cost of materials purchased by the Claimants was \$21,919.46. In addition, there were miscellaneous materials purchased by the Claimants for Kery Construction to complete the

Project in the amount of \$1,885.41. (Cl. Ex. 13). These amounts have been paid by the Claimants.

19. In addition, the Claimants separately entered into contracts to complete the Project with J&J Seamless Gutters, Inc., in the amount of \$1,864.00; Myco Plumbing & Heating, Inc. in the amount of \$6,000.00; Antonio Cuhana, in the amount of \$1,000.00 and James Disposal Service in the amount of \$850.00. The total amount of \$9,714.00 has also been paid by the Claimants.

### DISCUSSION

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. 2014). *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. Section 8-405(e)(1) of the Business Regulation Article (2010) provides that the Commission may not award from the Fund “more than \$20,000 to one claimant for the acts or omissions of one contractor.”

For the following reasons, I find that the Claimant has proven eligibility for compensation. First, the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimants. Second, the Respondent failed to complete the home improvement. Third, the Claimants suffered an actual loss as the Respondent took the Claimants’ money and failed to fulfill his obligations under the terms of the Contract.

~~The Claimants entered into the Contract (Cl. Ex. 1A) on February 4, 2012. The Contract~~  
was a fixed price contract. One change order was agreed to by the parties in the amount of \$2,100.00. No other change orders were agreed to by the parties. The Respondent had the lowest bid for the Project. One other bid was for \$225,000.00 for the same Project. The payment schedule required that certain milestones be met before identified payments were due.

By April 14, 2012, the Claimants had paid the Respondents \$111,000.00 towards the cost of the Project. At that time, the Respondent had not completed sufficient work on the Project to require payment in that amount; however, the Claimants paid the amounts despite having no contractual obligation to do so.

On or about May 1, 2012, the Respondent requested that the Claimants pay him an additional \$18,000.00 towards the Contract price. This requested payment was not required by the terms of the Contract since the Respondent had not completed the work in accordance with the payment schedule to justify the payment. The Respondent informed the Claimants that he would not proceed on the Project unless he was paid this amount. The Claimants did not want work on the Project to stop so they gave the Respondent a check for \$18,000.00 but requested that it not be cashed until they gave the Respondent authority to do so. In exchange for the check, the Claimants wanted to receive a breakdown of the disbursements made by the Respondent to obtain an understanding of where their money had gone towards completion of the Project. As a follow-up to their request, on May 2, 2012, the Respondent provided the Claimants with a Change Order Agreement (Cl. Ex. 5) that included a cost overage amount of \$12,500.00.

The Claimants were not satisfied with this change order request and did not execute it. Instead, the Claimants requested another breakdown of expenditures by the Respondent. The Respondent provided another change order (Cl. Ex. 6) that did not provide the requested information. Instead it included a breakdown of work to be completed and a price to complete each item.

Again, the Claimants did not receive what they asked for and requested a breakdown of the expenditures made by the Respondent towards completion of the Project. The Respondent provided another change order (Cl. Ex. 7) that did not include the requested information. A



meeting was held on or about May 8, 2012 to discuss the Respondent's failure to provide the requested information. In addition, at the meeting the Respondent requested additional money that would be needed to complete the Project, over and above the fixed price specified in the Contract. The Claimants were not prepared to provide the Respondent with money over and above the agreed upon contract price. The Respondent did not want to complete the Project unless he was paid in advance of the payment schedule plus an additional amount over the fixed contract price. The Claimants did not remove the Respondent from the Property but advised the Respondent that he could continue to work on the Project and catch up with the work required under the payment schedule included in the Contract. After the meeting of May 8, 2012, the Respondent did not return to complete the Project.

The Claimants had no intention of paying the Respondent any more money until the Respondent provided them with the requested information so they could understand where the money they paid to the Respondent had gone. Additionally, the Claimants wanted the Respondent to perform the work in accordance with the payment schedule before any further payments were made.

The Respondent made it clear to the Claimants that he would not perform any more work unless he was paid additional money on the Project. Knowing that the Respondent was not prepared to work any further on the Project, the Claimants undertook to complete the Project as described in the Contract. The Claimants contacted a subcontractor of the Respondent to inquire ~~whether he would be able to complete the Project. After some discussion, the subcontractor,~~ Kery Construction, verbally agreed to complete the Project.

The agreement with Kery Construction was for installation and construction services. It did not include the purchase of materials that were included in the Contract. The materials were purchased by the Claimants and used by Kery Construction to complete most of the Project. The

total cost of materials purchased by the Claimants for use by Kery Construction was \$21,919.46. The cost of Kery Construction's labor to install the materials was \$24,000.00. The Claimants also purchased miscellaneous materials for the Project that were used by Kery Construction in the amount of \$1,885.41. Additionally, there were separate contracts for materials and installation that were part of the Project that were not performed by Kery Construction. They included contracts with J&J Seamless Gutters, Inc. in the amount of \$1,864.00; Myco Plumbing & Heating, Inc. in the amount of \$6,000.00; Antonio Cuhana, in the amount of \$1,000.00 and James Disposal Service in the amount of \$850.00. All of these charges were paid in full by the Claimants for a combined total \$57,518.87. These contracts were all necessary to complete the Project and included only work that was specified in the Contract.

On October 3, 2012, after the Claimant filed her complaint with the MHIC, and after receiving a request by the investigator for the MHIC, the Respondent provided the Claimant with a breakdown of payments made by him towards the Project. The Respondent did return to the Property at the behest of the MHIC investigator to fix a portion of the roof.

The Respondent claims that he was ordered off of the Property on or about May 8, 2012. He further argues that because he was ordered off the Property, he was unable to complete the Project and should not be held accountable for the costs incurred by the Claimants to complete the Project. The Claimants argue that they entered into a fixed price contract and only those change orders agreed to between the parties should alter the terms of the Contract. The

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Claimants further argue that they had paid in advance of the payment schedule contained in the Contract and became concerned when the Respondent asked for more payments to complete the job ahead of what was required under the payment schedule. They were also concerned that the Respondent was seeking additional funds from the Claimants which exceeded the total price of the Contract. They sought documentation from the Respondent to show his disbursements to

vendors but never received what they requested until after their Complaint was filed with the MHIC and long after the Respondent left the Property.

I find that the Claimants' version of events is more credible than that of the Respondent. First, there is no question or dispute that the Claimants had paid the Respondent in advance of the payment schedule contained in the Contract. The Claimants did not have to make payments ahead of schedule, but decided to do so. When they were asked by the Respondent for additional funds, without the commensurate amount of work called for in the payment schedule, the Claimants became concerned that their money was not being spent properly on the Project and requested an accounting from the Respondent. Rather than provide an accounting, the Respondent provided the Claimants with a change order (Cl. Ex. 5) which included an amount of \$12,500.00 as a "Total Cost Overage." There is no overage in a fixed cost contract unless the parties agree to a change order. During his testimony, when asked why he identified the \$12,500.00 as a cost overage, he responded that this was really not a cost overage but was part of the original Contract price. I do not find his statement credible. It is simply unreasonable to categorize something as being a cost overage and have that same amount included as part of the fixed price Contract. The Claimants had reason to be concerned, especially when the Respondent demanded that he receive \$18,000.00 to continue the Project when that amount was not scheduled to be paid. The Respondent was denied authority to cash the check. When the Claimants refused to agree to a change order increasing the price of the fixed price Contract, the Respondent abandoned the Property and did not perform any additional work on the Project.<sup>3</sup>

I found that the Respondent was a licensed home improvement contractor for the purposes of reimbursement by the Fund. I also find that the Respondent's work was "unworkmanlike, inadequate, or incomplete." Md. Code Ann., Bus. Reg. § 8-401. I therefore

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<sup>3</sup> The Respondent did have a subcontractor perform a minor roof repair in October 2012.

conclude that the Claimant is entitled to recover compensation from the Fund for an actual loss resulting from acts or omissions by the Respondent. Md. Code Ann., Bus. Reg. §8-405(a) (Supp. 2014).

The next issue is to determine the amount of the Claimant's actual loss. 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). The applicable regulation, however, provides in pertinent part as follows:

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).

Using the above formula, the Claimant's actual loss is \$16,633.46 and is calculated as follows:

\$ 113,100.00	Amount the Claimant paid the Respondent
<u>+\$57,518.87</u>	Adding the amount paid to complete Project
\$ 170,618.87	Subtotal
<u>\$-152,100.00</u>	Minus the original Contract Price and Change Order
\$ 18,518.87	The Claimants actual loss

Therefore, I conclude that the Claimants are entitled to compensation from the Fund in the amount of \$18,518.87.

### CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimants have sustained an actual loss in the amount of \$16,633.46 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 (2010), 8-405 (Supp.

2014). The Claimant, therefore, is entitled to reimbursement from the Fund in the amount of \$18,518.87.

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$18,518.87; and

**ORDER** that the Respondent be 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 reflects this decision.

**Signature on File**

October 8, 2014  
Date Decision Issued

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Stuart G. Breslow  
Administrative Law Judge

SGB/cj  
# 151639



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DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING  
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MARYLAND HOME IMPROVEMENT COMMISSION  
MARYLAND HOME IMPROVEMENT COMMISSION  
500 N. Calvert Street, Room 306  
500 N. Calvert Street, Room 306  
Baltimore, MD 21202-3651  
Baltimore, MD 21202-3651

## PROPOSED ORDER

*WHEREFORE, this 25th day of November 2014, 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

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