IN THE MATTER OF THE CLAIM	*	**BEFORE SUSAN H. ANDERSON,**
OF THOMAS BREINER AND	*	**AN ADMINISTRATIVE LAW JUDGE**
JILL BREINER,[1]	*	**OF THE MARYLAND OFFICE**
CLAIMANTS	*	**OF ADMINISTRATIVE HEARINGS**
AGAINST THE MARYLAND HOME	*	
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF MARK LETERSKY	*	**OAH No.: DLR-HIC-02-19-00469**
T/A THE VILLAGE CARPENTER,	*	**MHIC No.: 18 (90) 15**
RESPONDENT		

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PROPOSED DECISION

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STATEMENT OF THE CASE

On November 19, 2017, the Claimants filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $9,364.84 in actual losses allegedly suffered as a result of a home improvement contract with Mark Letersky, t/a The Village Carpenter (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411

[1] This claim was originally filed in Mr. Breiner's name only. At the hearing, I granted his request to amend the claim to include Mrs. Breiner, who is his wife and who, like Mr. Breiner, is a party to the contract at issue and an owner of the residence at issue, as a claimant. Code of Maryland Regulations 09.08.03.02C(2). Mr. and Ms. Breiner will hereinafter be referred to in the collective as "Claimants."

(2015)[2]. On December 21, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on May 8, 2019, at the OAH in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Nicholas Sokolow, Assistant Attorney General, Department of Labor, Licensing, and Regulation[3] (Department), represented the Fund. The Claimants represented themselves. The Respondent represented himself. The day before the hearing, the Respondent filed a Motion to Dismiss (Motion). I heard arguments from the parties at the start of the hearing, reserved ruling on the Motion and proceeded to hear the case on the merits.

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. 2018); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

1. Does the work performed by the Respondent under the home improvement contract in this case meet the definition of "home improvement" under Maryland law thus conferring jurisdiction in this matter to the MHIC?
2. Did the Respondent perform an unworkmanlike, inadequate and/or incomplete home improvement resulting in an actual loss to the Claimants compensable by the Fund?
3. Did the Claimants unreasonably reject the Respondent's efforts to resolve the problem?
4. If not, what is the amount of the compensable loss?

[2] References to the Business Regulation Article herein cite the 2015 volume of the Maryland Annotated Code.
[3] Effective July 1, 2019, the Department changed its name to the Maryland Department of Labor.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimants' behalf:

Clmt. Ex. 1 - Complaint Form, Home Improvement Commission, June 25, 2017

Clmt. Ex. 2 - Photographs taken February 21, 2017, by Mr. Breiner of Build One[4] and of materials Respondent purchased for project

Clmt. Ex. 3 - Photographs taken April 18, 2017, by Mr. Breiner of Build Two progress

Clmt. Ex. 4 - Estimate and Contract for Home Improvement between Respondent and Claimants, December 29, 2016

Clmt. Ex. 5 - Work Order No. 3, February 21, 2017

Clmt. Ex. 6 - Order from Department to Respondent, July 20, 2017

Clmt. Ex. 7 - Series of emails between Claimants and Respondent, March 16, 2017; March 10, 2017; March 9, 2017; March 3, 2017; March 2, 2017; March 1, 2017; February 21, 2017

Clmt. Ex. 8 - Series of emails between Claimants and Respondent, March 1, 2017; February 21, 2017

Clmt. Ex. 9 - Series of emails between Claimants and Respondent, March 27, 2017; April 17, 2017

Clmt. Ex. 10 - Series of emails between Claimants and Respondent, May 8, 2017; April 30, 2017; May 13, 2017

Clmt. Ex. 11 - Email from Claimants to Thomas Marr, Department investigator, August 30, 2017; emails between Claimants and Respondent, August 17, 2017; August 11, 2017; August 9, 2017

Clmt. Ex. 12 - Houzz profile of The Village Carpenter, undated; emails between Mrs. Breiner and Cameron Jolley, Chief Electrical Inspector, Baltimore County Government, May 3, 2019; Department Master Electricians Public Query form with results, undated; Department Plumbers Public Query form with results, undated;

Clmt. Ex. 13 - Check from Claimants to Respondent in the amount of $3,500.00, December 30, 2016; check from Claimants to Respondent in the amount of $3,500.00, January

[4] As detailed below, there were two different attempts to build the shelving called for in the contract in dispute. To distinguish between the two, I refer to them as Build One and Build Two.

17, 2017; check from Claimants to Respondent in the amount of $1,996.00, January 31, 2017; check from Claimants to Respondent in the amount of $368.79, April 8, 2017

Clmt. Ex. 14 - Estimate from Highland Renovations in the amount of $16,383.98, November 9, 2017

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notice of Hearing, April 18, 2019

Fund Ex. 2 - Hearing Order, December 21, 2018

Fund Ex. 3 - Letter from the Department to the Respondent with completed Home Improvement Claim Form, December 6, 2017

Fund Ex. 4- Licensing History summary, printed May 8, 2019

The Respondent did not offer any exhibits.

Testimony

The Claimants presented the testimony of Mr. Breiner and the Respondent.

The Respondent testified on his own behalf.

The Fund presented no additional 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 107432.

2. On December 29, 2016, the Claimants and the Respondent entered into a contract to build and install a media center unit around the fireplace in the Claimants' family room (Contract). The project included the construction and installation of "built-in" bookcases including doors covering the bottom shelves,[5] a mantle over the fireplace, the installation of a

[5] As conceived by the Respondent, the bookcases would appear to be built in but would actually be freestanding on either side of the fireplace.

bracket over the fireplace to hold a television, tiling the fireplace and firebox with decorative tiling, leveling the existing hearth to accommodate real stone sections, installing a wood product kick wall to the front of the existing brick hearth, rerouting of electrical components, and the reconfiguring of existing ceiling lighting fixtures. The Claimants presented the Respondent with a photograph of a fireplace area with built-in bookcases surrounding it to give him an idea of how they wanted the project to look when finished.

3. The original agreed-upon Contract price was estimated to be between $9,200.00 and $9,575.00 depending on the materials chosen for the project.

4. On December 30, 2016, the Claimants paid the Respondent $3,500.00; on January 17, 2017, the Claimants paid the Respondent $3,500.00; on January 31, 2017, the Claimants paid the Respondent $1,996.00; and on April 8, 2017, the Claimants paid the Respondent $368.78.

5. The Respondent built the first set of bookshelves using melamine boards. The boards had holes running up and down the sides to accommodate adjustable shelving units (adjustment tracks), which the Claimants had initially indicated they wanted. The Claimants were dissatisfied with this first attempt (Build One). The shelves were not deep enough to accommodate the Claimants' electronic equipment with cords. The Claimants did not like the look of the adjustment tracks on the sides of the unit, nor did they approve of the use of the melamine boards for the project.

6. On March 1, 2017, the Respondent forwarded a Change Order (Work Order No. 3) to the Claimants whereby the Respondent agreed to disassemble and remove the product installed to that point and replace it with deeper, fixed shelves (eliminating the need for adjustment tracks) using an all wood product (Build Two). On April 8, 2017, the Claimants paid $368.79 for this change to the Contract.

7. On March 9, 2017, the Respondent advised the Claimants, in response to their questions about Build Two, that he would be using painted maple, birch and poplar for the wood; the shelves would be 14" to 16" deep; the base of the shelving units would have a horizontal wainscoting cabinet door that folded down for access to the shelves behind; and that he had altered the design a bit from the photograph the Claimants originally provided to accommodate the Claimants' specific requirements.

8. In late March, the Claimants' agreed to Work Order No. 3 and requested, and the Respondent agreed, to complete Build Two by April 12, 2017. On April 13, 2017, the Respondent notified the Claimants that he had been unable to complete the job as there was a problem with his plan for the mantle and he was having difficulty constructing the unit according to the specifications the Claimants had provided him.

9. The Claimants were dissatisfied with the delays and the length of time it had taken the Respondent to construct the part of the project he had actually completed. They were also concerned because they believed that the Respondent was over-charging them for the cost of the materials. In February 2017, when they had priced out the cost of some of the materials the Respondent stored in their garage, they determined the materials had a retail cost in the hundreds of dollars, rather than the thousands the Respondent was charging. The Respondent had not directly broken down the cost of materials he was using, despite their repeated requests. As a result of these concerns, the Claimants changed the code on their front door lock so that the Respondent no longer had access to the job.

10. In an email to the Respondent on April 17, 2017, the Claimants detailed their concerns. First, with regard to the fireplace, they noted the Respondent had tiled the interior walls with ceramic tile and the floor of the fireplace with marble tile which they alleged did not

meet fire code and would not pass an inspection should the house be sold. Next, the Claimants complained that the Respondent had used cheap materials on the project, much of it plywood, and the wood was rough and he was using "cheap trim" to cover the rough edges of the plywood shelves. The Claimants expressed concern that the Respondent had not used the "hardwood" they had envisioned and he had indicated he would use. They pointed out that there did not appear to be adequate room to anchor hinges for the drop-down cabinet doors on either side of the fireplace. The Claimants further stated the fireplace mantle the Respondent had purchased did not fit and instead he had used a plywood shelf and they believed the height of the mantle/shelf would not meet the standards established by the National Fire Protection Association. In addition, the Claimants were dismayed to see there was no electrical outlet and cable pass-through next to the TV mount; the electric boxes the Respondent had used did not fully recess into the backboard; two out of three outlets were not working; and the outlets were not flush with the paneled back of the shelving unit. Moreover, the Claimants noted gaps between the materials and the framing that they believed to be "unsightly." Finally, the Claimants noted that the Respondent had missed the agreed deadline of April 12, 2017 for completion of the project. The Claimants asked that the Respondent refund all the money paid to date, less the cost of installing the ceiling fan and wall switches.

11. The parties engaged in discussions in April and May 2017 to try and come to an amicable resolution of the matter, to no avail. By this point, the Claimants were concerned the project would never be finished; they wanted to cancel the contract, pay for the materials used to date and the labor expended so far, have the Respondent remove the work completed to date and "call it a day." However, the Claimants were unwilling to allow the Respondent to take down

the parts of Build Two that he had completed until they reached an agreement about overall costs and how much the Respondent would refund to them.

12. In an email dated May 8, 2017, the Claimants proposed paying a total of $1,996.05 for the project as it stood on April 13, 2017 ($1,500.00 for time and materials, plus $496.05 for work performed under Work Orders One and Two which involved rewiring and relocating the existing ceiling fan wall switch and removing and replacing the existing ceiling fan). As they had paid $9,364.84 to date, they asked for a refund of $7,368.79 for the unfinished portion of the project. Once that was settled, the Claimants agreed to allow the Respondent to collect the unit and mantle for reuse.

13. On May 13, 2017, the Respondent countered with an offer to remove the unit and waive the remaining $1,075.00 due under the Contract. At this point, negotiations broke down and the parties were unable to resolve the matter, which led to the filing of the Complaint with the MHIC.

DISCUSSION

Motion to Dismiss

On the day before the hearing, the Respondent filed a Motion to Dismiss. Because neither the Claimants nor the Fund had the opportunity to respond prior to the hearing, I heard arguments from the parties at the start of the hearing, reserved ruling on the Motion, and proceeded to hear the case on the merits. The Claimants and the Fund opposed the Motion. The attorney for the Fund pointed out that, pursuant to the applicable regulations, an ALJ may not grant a motion to dismiss or any other dispositive motion without the concurrence of all the parties. COMAR 09.01.03.05(B). As all the parties did not concur, I am precluded from

granting the Motion. I will, however, address the underlying argument the Respondent made in the Motion.

Analysis

In this case, the Claimants have the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).[6] "[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); *see also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a licensed contractor"). "'[A]ctual 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 Claimants have not proven eligibility for compensation.

1. *Does the work performed by the Respondent meet the definition of "home improvement" as contemplated by the statute and regulations thus conferring jurisdiction in this matter to the MHIC?*[7]

As a preliminary matter, the Respondent argues that the work he performed does not constitute a home improvement under the statute. The Respondent pointed out that the

[6] As noted above, "COMAR" refers to the Code of Maryland Regulations.
[7] This was the basis for the Respondent's Motion to Dismiss re: Jurisdiction. While I have denied the Motion, I will still address the argument, which the Respondent raised again during the hearing.

bookcases he constructed were free standing and not attached in any way to the house itself. Moreover, while he hung a bracket for a television set, the Commission has determined that is not work that requires a license.[8] For these reasons, the Respondent contends he is not subject to the jurisdiction of the MHIC for purposes of this project.

Section 8-101 of the Business Regulation Article of the Maryland Annotated Code defines home improvement as:

> (i) the addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building or part of a building that is used or designed to be used as a residence or dwelling place or a structure adjacent to that building; or
> (ii) an improvement to land adjacent to the building.

Md. Code Ann., Bus. Reg. §8-101(g)(1).

While section 8-101(g)(2) and (3) further specify what constitutes a home improvement and what does not,[9] the statute does not provide an exhaustive list of the types of work requiring

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[8] Information in the FAQ section of the MHIC website states, "The Commission has determined that installing wall-mounted televisions in residences is not considered "home improvement;" therefore an MHIC license is not required." https://www.dllr.state.md.us/license/mhic/mhicfaq.shtml (last visited July 16, 2019).

[9] (2) "Home improvement" includes:
(i) construction, improvement, or replacement, on land adjacent to the building, of a driveway, fall-out shelter, fence, garage, landscaping, deck, pier, porch, or swimming pool;
(ii) a shore erosion control project, as defined under § 8-1001 of the Natural Resources Article, for a residential property;
(iii) connection, installation, or replacement, in the building or structure, of a dishwasher, disposal, or refrigerator with an icemaker to existing exposed household plumbing lines;
(iv) installation, in the building or structure, of an awning, fire alarm, or storm window; and
(v) work done on individual condominium units.
(3) "Home improvement" does not include:
(i) construction of a new home;
(ii) work done to comply with a guarantee of completion for a new building project;
(iii) connection, installation, or replacement of an appliance to existing exposed plumbing lines that requires alteration of the plumbing lines;
(iv) sale of materials, if the seller does not arrange to perform or does not perform directly or indirectly any work in connection with the installation or application of the materials;
(v) work done on apartment buildings that contain four or more single-family units; or
(vi) work done on the commonly owned areas of condominiums.

an MHIC license. For guidance, on its website the MHIC provides a list of 90 types of work that usually must be completed by a licensed contractor.[10]

The Respondent is correct that the hanging of a bracket for a wall-mounted television does not require a MHIC license. He is further correct that the assembly and placement of furniture (in this case, the bookcases) without attaching it to the home in a permanent manner does not require an MHIC license. If that is all the Respondent had contracted to do, he would not be subject to the MHIC's jurisdiction.

However, the building of the bookcases and the hanging of the television were only two individual components of the overall project the Respondent contracted to do. The fact that two of the components of the project do not require MHIC licensing does not mean that no part of the project required such licensing. The Contract must be viewed in its entirety: the project was multi-faceted and included tiling the fireplace and firebox with decorative tiling, leveling the existing hearth to accommodate real stone sections, installing a wood product kick wall to the front of the existing brick hearth, rerouting of electrical components, and the reconfiguring of existing ceiling lighting fixtures, along with building the bookcase units and installing the bracket for the television. The examples of work requiring an MHIC license on the MHIC website include drywall work[11], painting, marble work and tiling, at least some of which the Respondent did in conjunction with the project. In addition, the Contract itself lists as the scope of work: "Residential Improvements: Interior." It is clear from the description of the work that the project was meant to improve and remodel the family room and the

[10] https://www.dllr.state.md.us/license/mhic/mhicwhatishi.shtml (last visited July 16, 2019)
[11] As the Respondent had performed electrical work which required cutting into existing drywall, it is reasonable to assume he would have to patch the holes in order to complete the work.

project could not be fully completed by someone lacking the requisite MHIC license. For these reasons, I conclude the MHIC has jurisdiction over this matter.

2. *Did the Respondent perform an unworkmanlike, inadequate and/or incomplete home improvement resulting in an actual loss to the Claimants compensable by the Fund?*

The Claimants assert the Respondent performed unworkmanlike, inadequate, and incomplete home improvements, which resulted in an actual loss to them. In support of this assertion, the Claimants point to the state of the project when they returned home from a spring break trip in April 2017. In an email to the Respondent on April 17, 2017, the Claimants detailed their concerns. First, with regard to the fireplace, they noted the Respondent had tiled the interior walls with ceramic tile and the floor of the fireplace with marble tile which they alleged did not meet fire code and would not pass an inspection should the house be sold. Next, the Claimants complained that the Respondent had used cheap materials on the project, much of it plywood, and the wood was rough and he was using "cheap trim" to cover the rough edges of the plywood shelves. The Claimants expressed concern that the Respondent had not used the "hardwood" they had envisioned and he had indicated he would use. They pointed out that there did not appear to be adequate room to anchor hinges for the drop-down cabinet doors on either side of the fireplace. The Claimants further stated the fireplace mantle the Respondent had purchased did not fit and instead he had used a plywood shelf and they believed the height of the mantle/shelf would not meet the standards established by the National Fire Protection Association. In addition, the Claimants were dismayed to see there was no electrical outlet and cable pass-through next to the TV mount; the electric boxes the Respondent had used did not fully recess into the backboard; two out of three outlets were not working; and the outlets were

not flush with the paneled back of the shelving unit. Moreover, the Claimants noted gaps between the materials and the framing that they described as "unsightly."

The Respondent counters that the Claimants cannot use the state of the project on April 13, 2017, as proof of an unworkmanlike home improvement because the project had not been completed. He maintains that he used the proper materials to construct the bookcases in that he used maple hardwood plywood with a poplar trim. The Respondent further asserts that the gaps between the materials and the framing would have been corrected when the project was finalized, but that he did not want to work more on the project once it became obvious to him that the mantle he had purchased "wouldn't look right" given the size and dimensions of the sound bar the Claimants had given him. The Respondent explained he wanted to discuss the project with the Claimants before proceeding further but then was unable to do any more work because they locked him out of the site and the parties could never resolve the situation to anyone's satisfaction.

The Claimants cannot prevail on this issue as they failed to demonstrate the Respondent preformed an unworkmanlike, inadequate, or incomplete home improvement. First, while they allege that the Respondent did not use "hardwood" to construct the shelves, the addendum to the Contract (Work Order No. 3) states only that the "entire product" will be constructed from "an all wood product line." Moreover, in an email on March 9, 2017, the Respondent clarified that he would be using painted maple, birch and poplar for the project. The Respondent testified at the hearing that he used maple hardwood plywood with a poplar trim to construct the bookcase units and that he purposefully used the maple because it matched the maple from the cabinets in the Claimants' kitchen. The Claimants presented no evidence from which to conclude that the plywood materials the Respondent used were not an "all wood product" or that using such

materials constituted a failure to follow industry standards when constructing a unit such as the bookshelves at issue. Essentially, it appears there was never a true "meeting of the minds" as to this matter. The Claimants obviously believed "hardwood" meant something other than "plywood" while the Respondent used the term to include "hardwood plywood." The term is not defined anywhere within the Contract, Work Order No. 3, or any of the emails in evidence.

Additionally, the Claimants expressed dissatisfaction with the Respondent's use of poplar trim, which they characterized as "cheap," to cover the rough edges of the plywood shelves, and with the fact that the surface of the wood painted so far was rough to the touch, indicating it had not been sanded before paint was applied or the paint had been improperly applied. However, once again, their dissatisfaction with the materials used, unsupported by additional evidence to show such use violated the terms of the Contract or some sort of industry standard, is insufficient to show that the Respondent's work was unworkmanlike. Also, as the project was not finished, there is insufficient evidence to show the "roughness" of the painted surface would not have been corrected in the finished product.

The Claimants were also upset that there were "unsightly" gaps between the materials used to construct the bookcases and the framing; however, they failed to successfully rebut the Respondent's testimony that any gaps or other imperfections would be fixed by the time the project was completed. They were additionally displeased that there was no electrical outlet and cable pass-through next to the TV mount, the electric boxes the Respondent had used did not fully recess into the backboard; two of three outlets were not working; and the outlets were not flush with the paneled back of the shelving unit. However, as the Respondent pointed out, he did not finish the project. He intentionally stopped work prior to completion in order to discuss some concerns with the Claimants.

The Claimants also asserted the Respondent performed electrical work requiring a license that he did not possess and failed to obtain the necessary electrical permits. The Respondent vociferously denied the electrical work required a special license or that permits were needed; he testified that he was not rewiring circuitry (which would have required a license and a permit) and instead was merely moving wiring from one electrical box to another. The Claimants presented no expert testimony or other evidence to demonstrate that the work performed required an electrical license or special permitting. Without such evidence, I cannot find that the Respondent was derelict in failing to obtain the proper permits and in failing to have a licensed electrician perform the work.

Similarly, the Claimants alleged the height of the mantle/shelf the Respondent designed would not meet the standards established by the National Fire Protection Association which would be problematic if and when they sold the house. Again, the Claimants presented no evidence, either from an expert witness or otherwise, to demonstrate what those standards are or even to establish the height of the mantle the Respondent designed and installed.

For these reasons, I do not find the Claimants have proven that the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement. Thus, they are barred from recovering from the Fund.

However, even if I did find the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement, the evidence shows the Claimants unreasonably rejected the Respondent's good faith efforts to resolve the claim. The Claimants were clearly frustrated by the amount of time the project was taking. Most of the delay is attributable to the fact that there was a lot of back and forth discussion about the specifics of Build Two and the Claimants' attempts to get the Respondent to specifically detail the cost of the materials he was using. In

addition, Mr. Breiner testified to the stress it created to have their family room unusable for such a long period of time. It is also clear from the testimony and emails that the Claimants considered the Respondent a close friend and therefore did not push him to get the work completed more quickly at first and then felt betrayed when he failed to come through for them.

The Claimants point to the unfinished and unacceptable state of the project at the time the Respondent stopped work, along with the evasiveness he exhibited each time he was asked to justify the Contract pricing, and the length of time the project had taken only to still not be completed, in support of their contention that not only had the Respondent performed an unworkmanlike home improvement but they were justified in not allowing him the opportunity to correct the issues.

The main sticking point for the Claimants throughout the process was the Respondent's failure to adequately explain how he arrived at a materials quote of "$4,450.00 to $4,575.00." The Claimants did not question this at the time they signed the Contract. It was only after the Respondent had started Build One using the melamine boards and stored some materials in the Claimants' garage that they started to have "concerns about material costs versus what [they] were charged." The Claimants checked the UPC codes on the materials and from that determined the materials the Respondent proposed to use would cost a few hundred dollars rather than almost $5,000.00. Moreover, they were dissatisfied with the use of the melamine boards the Respondent used as they believed it was cheaper material than what they had contracted for.

The questions about material costs did not abate even after the Respondent agreed to disassemble and remove the product he had built to date (Build One) and replace it with a product using an "all wood product line." By email dated February 21, 2017, the Claimants requested a cost breakdown of the new materials on the Change Order. The Respondent replied

the same day but did not provide exact figures; he merely indicated all natural wood products are typically forty to forty-five percent higher in cost than the materials he had used for Build One but that it didn't automatically follow that the overall materials costs would "be that much higher by percentage."

The Claimants and Respondent emailed back and forth several times between March 1, 2017 and March 16, 2017. On March 1, 2017, the Respondent forwarded Work Order #3 (the Change Order) in the amount of $368.79 with an email stating that "when all is said and done, the completed project will come in within, or under, the original Proposal, notwithstanding Work Orders. . . ." On March 2, 2017, the Claimants emailed the Respondent asking that he look at the original picture they had provided him at the start of the project and "detail out what is needed to go from where we are now to that original plan[.]" In this email, the Claimants expressed a desire to make sure the parties were in agreement as to what was to be done so the project could be wrapped up.

On March 2, 2017, the Claimants sent another email asking for clarification as to exactly what materials the Respondent planned to use, the dimensions of the shelves, and whether the bottom of the shelving would look like cabinets or drawers. On March 9, 2017, the Respondent replied, answering all of the Claimants' questions. On March 10, 2017, the Claimants asked for further clarification and indicated they wished to drop the interior lighting; they also asked if it would be possible for him to "eliminate work orders and just determine how much a final payment would be to complete the build including the necessary electric and cable routing. . ." so they would have a firm total for the project and know that they were going to stay on budget. On March 16, 2017, the Respondent replied the only added work order was the one for $368.79 and so the Claimants owed him that plus between $700.00 and $1,075.00 for the work remaining on

the contract that had not already been paid. Later that same day, the Claimants told him to do what "is appropriate" to make the shelving thickness look good and asked if he could finish the work by March 30, 2017.

It is clear the Claimants believed they were not getting the quality of product they thought they had contracted for as evidenced by the many emails asking the Respondent to specifically account for the materials pricing. They were also troubled by the fact the Contract contained ranges in pricing for materials and labor rather than spelling out exactly what each item would cost. Their concerns were compounded when the Claimants actually looked up the prices for some of the materials the Respondent stored with them while he was working on Build One and saw the materials cost significantly less than what he charged them. It is entirely possible there was a very high profit margin on materials and work the Respondent provided. However, the Claimants had agreed to the Contract as it was written; it made no representations about his mark-up on materials. Therefore, the Claimants cannot rely on the Respondent's charging more than they think is proper as evidence he would not attempt in good faith to resolve the Claimants' concerns.

The Claimants were also upset with the length of time the project had taken and listed that as another reason they refused to allow the Respondent to try and fix the project. According to the Claimants, the project had already dragged on so long they were afraid allowing the Respondent more time to fix it would result in the project never being completed.

It is true the Respondent agreed to finish the project by April 12, 2017, just before the Claimants were due to arrive back home after a spring break trip. It is also true that he failed to do so. However, the testimony demonstrated that the failure was due to the fact that the Respondent was "struggling with dimensions" given the specifications the Claimants had given

him regarding the depth of the shelves and was concerned that the sound bar they had given him was too wide for the unit and would have stuck out. The Respondent explained to them at the time and testified at the hearing that he had stopped work on the project until he could work with them to resolve the issues so they would be satisfied with the final outcome.

A major problem with this project appears to be that there was no formal plan. The Claimants provided the Respondent with a picture from the Internet of what they wanted and then specified the dimensions they needed after seeing that Build One was not adequate for their needs. Again, the Claimants and the Respondent appear to have been at cross-purposes here. The Claimants were relying on the Respondent's "expertise" to create a plan and the Respondent was relying on the Claimants to advise him what they wanted. The end result was a lot of confusion for both parties.

However, the Respondent had been amenable to removing Build One and replacing it with something more acceptable to the Claimants. While he was evasive when it came to answering direct questions about cost specifics, the Claimants presented no other evidence from which to conclude the Respondent would not be willing to complete and/or fix the unit to their satisfaction. He may not have been able to do so; however, by locking him out, the Claimants deprived him of the chance to resolve the matter.

It appears the Claimants believed the Respondent failed to negotiate to resolve the matter in good faith in April and May 2017. However, the Claimants provided no evidence that would allow me to determine that the $1,500.00 they proposed to pay the Respondent for time and materials, including work on the fireplace, hearth, and "additional efforts on the project," was a reasonable offer of settlement on their part.

Finally, even if the Claimants had proven the Respondent performed an unworkmanlike, inadequate and/or incomplete home improvement, and that they had good cause to refuse his effort to rectify the matter, they would still not prevail as they failed to demonstrate their actual losses. The Claimants provided an estimate from Highland Renovations in the amount of $16,383.93. However, the estimate is not for the same scope of work contemplated by the Contract entered into between the Claimants and the Respondent. For instance, the estimate is for actual built-in shelving on either side of the mantle rather than the freestanding shelves the Respondent built. It also calls for installation of a fireplace screen with a glass door, something not outlined in the Contract or any of the Work Orders. The work envisioned by the estimate is simply not the same as the work anticipated by the Contract. In addition, the Claimants provided no breakdown or any figures that would allow me to determine which work the Respondent performed is usable and thus not subject to recovery, such as the cost for the replacement of the ceiling fan.

Unfortunately, while I am sympathetic to the Claimants' dissatisfaction with the Respondent's work and their upset over the disintegration of what seems to have been a close friendship, ultimately they have not met their burden in this case and I therefore recommend that their claim be denied.[12]

PROPOSED CONCLUSIONS OF LAW

I conclude the Respondent is subject to the jurisdiction of the Maryland Home Improvement Commission because the contract at issue was a home improvement contract under Maryland law. Md. Code Ann., Bus. Reg. § 8-101 (2015)

[12] The Fund made no recommendation as to whether the claim should be granted or denied.

I further conclude that the Claimants have not sustained an actual and compensable loss as a result of the Respondent's acts or omissions. 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

July 24, 2019
Date Decision Issued

Susan H. Anderson
Administrative Law Judge

SHA/da
179879

PROPOSED ORDER

WHEREFORE, this 10th day of September, 2019, 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.

Wm. Bruce Quackenbush

Wm. Bruce Quackenbush
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION


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