

IN THE MATTER OF THE CLAIM	* BEFORE ROBERT B. LEVIN,
OF LOUIS HUZELLA,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF ROBERT SPERO,	*
T/A MARYLAND POOLS, INC.,	* OAH No.: DLR-HIC-02-16-36218
RESPONDENT	* MHIC No.: 15 (90) 1248

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On February 25, 2015, Louis Huzella, (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$18,403.52 in alleged actual losses suffered as a result of a home improvement contract with Robert Spero, trading as Maryland Pools, Inc. (Respondent).

I held a hearing on March 30, 2017 at the Frederick County Department of Social Services, 100 East All Saints Street, Frederick, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself. John D. Hart, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR or Department), represented

the Fund. After waiting more than thirty minutes past the scheduled time for the hearing, the Respondent failed to appear, so I proceeded with the hearing in the Respondent's absence. Code of Maryland Regulations (COMAR) 28.02.01.23A.¹

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); 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 is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 – Commercial Grade Swimming Pool Construction Contract, dated April 16, 2014
- Clmt. Ex. 2 – Email chain between the Claimant and Julie Chayt, dated May 18, 2015; May 26, 2015; May 27, 2015; and June 9, 2015
- Clmt. Ex. 3 – Photocopies of four photographs, dated June 9, 2015
- Clmt. Ex. 4 – Cash Payment Schedule, undated, with the following attachments: checks dated April 15, 2014; April 17, 2014; April 20, 2014; April 25, 2014; May 1, 2014; May 2, 2014; August 4, 2014; August 11, 2014; and March 2, 2015
- Clmt. Ex. 5 – City of Frederick Building Permit/Zoning Certificate, dated July 8, 2014
- Clmt. Ex. 6 – Wilcoxon Construction, Inc. contract, dated September 16, 2015
- Clmt. Ex. 7 – Aquatic Solutions, LLC invoice, dated November 18, 2015

¹ Notice of the hearing was mailed to the Respondent by OAH on January 5, 2017, by certified mail, to the address of record, COMAR 09.08.03.03A(2). The certified mail receipt for the Notice of Hearing was signed by Patti Spero as agent for the addressee on January 7, 2017, and the signed receipt was received by OAH on January 11, 2017.

Clmt. Ex. 8 – Aquatic Solutions, LLC invoice, dated March 30, 2015

Clmt. Ex. 9 – Santana Design Build, Inc. invoice, dated August 3, 2015.

Clmt. Ex. 10 – Handwritten notes marked “Paid to Sylvan Pools/Paster,” undated

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 – Notice of Hearing, dated January 5, 2017, with the following attachments: Certified Mail Receipt for Robert Spero, dated January 7, 2017 (delivery date); Certified Mail Receipt for Robert M. Stahl, Esq., dated January 9, 2017 (delivery date); and Certified Mail Receipt for Louis Huzella, dated January 7, 2017 (delivery date)

Fund Ex. 2 – Hearing Order, dated October 17, 2016

Fund Ex. 3 – MHIC license printout for Robert Spero, dated February 14, 2017

Fund Ex. 4 – Home Improvement Claim Form, received by HIC February 25, 2016

Fund Ex. 5 – DLLR license printout for Matthew Jackson, dated January 29, 2017, (expiration date)

Fund Ex. 6 – DLLR license printout for James William Wilcoxon and Mitchell Friedlander, dated December 16, 2017 and June 14, 2018 (respective expiration dates)

Fund Ex. 7 – Fund counsel’s handwritten calculation of the Claimant’s actual loss, prepared March 30, 2017

Testimony

The Claimant testified on his own behalf. The Fund did not present any witness testimony.

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 4466000.
2. The Respondent conducted a swimming pool construction business under the trade name of Maryland Pools, Inc. (MP).

3. On April 16, 2014, the Claimant and the Respondent entered into a contract (Contract) to construct a swimming pool and provide related equipment to the Claimant, to be located at the Claimant's primary residence in Frederick, Maryland. The contract stated that work would begin approximately seven days after a building permit was obtained and would be completed approximately thirty-five working days after completion of excavation, weather permitting.

4. The agreed-upon contract price for the work and materials to be provided by MP pursuant to the Contract (which includes several agreed-upon addenda thereto) was \$69,177.00, not including certain credits that MP agreed to give the Claimant.

5. MP completed the majority of the pool construction, including performing the pool excavation, and providing rebar (reinforcing steel), gunite (a concrete material), and most of the plumbing equipment.

6. The Claimant paid MP a total of \$70,740.00. The amount paid by the Claimant to MP is slightly in excess of the \$69,177.00 contract price because MP never applied certain credits that it promised the Claimant.

7. MP failed to complete the work under the Contract. It did not plaster the pool and adjacent spa, did not complete the installation of the pool cleaning system, and did not provide the chlorination system.

8. In early 2015, MP filed for bankruptcy.

9. MP did not respond to the Claimant's request that it complete the work under the Contract.

10. To complete the work under the Contract, the Claimant contracted with Wilcoxon Construction, Inc. (Wilcoxon), and Aquatic Solutions, LLC, both MHIC-licensed contractors.

11. The Claimant and paid Wilcoxon \$16,140.00 to plaster the pool and spa. The Claimant's payment to Wilcoxon was for work that MP was required to perform under the Contract, for which the Claimant paid MP, but which MP failed to perform.

12. The Claimant paid Aquatic Solutions \$4,229.25 to complete the installation of the pool cleaning system and \$2,509.77 to provide the chlorination system, for a total payment to Aquatic Solutions of \$6,739.02. The Claimant's payments to Aquatic Systems were for work that MP was required to perform under the Contract, for which the Claimant paid MP, but which MP failed to perform.

13. The Claimant also paid Santana Design Build, Inc. \$1,200.00 for the installation of tile at the spa bench, pool steps and love seat. These were not items that MP was contractually obligated to perform. The Claimant is not seeking reimbursement for these items.

14. The Claimant also paid Silva Pools \$1,530.00 for additional tile work that was not included in the Contract with MP. The Claimant is not seeking reimbursement for these items.

15. As of the date of the hearing, the pool project has been completed.

16. The Claimant's actual loss as a result of MP's failure to complete the Contract is \$24,442.02.

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)).²

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);³ *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a 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 proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. *See* Fund Ex. 3. The Respondent performed an incomplete home improvement. The Claimant’s credible, un rebutted testimony and corroborating exhibits establish that MP failed to complete the work under the pool Contract. Specifically, although the Claimant paid MP to plaster the pool and adjacent spa, to complete the installation of the pool cleaning system and to provide the chlorination system, MP failed to complete those items. As a result, the Claimant contracted with Wilcoxon to perform the plastering and contracted with Aquatic Solutions to complete the pool cleaning system and to provide the chlorination system.

² At the outset of the hearing, Fund counsel stated that MP’s form of contract generally included a provision requiring the parties to arbitrate any disputes between them. Fund counsel asserted that the Respondent waived the arbitration provision by not requesting or initiating arbitration of the Claimant’s claim. I note, however, that Cl. Ex. 1, the contract between the Claimant and MP, does not contain an arbitration clause. It may be that an arbitration clause—which Fund counsel suggested was routinely included in MP’s contracts—was printed on the reverse side of a contract page but was not included in Cl. Ex. 1 because the reverse side of the contract’s pages were not photocopied and included in Cl. Ex. 1, or that there is some other, unexplained reason that an arbitration clause is not contained in Cl. Ex. 1. In any event, as the record in this case does not contain an arbitration provision, the issue of whether the parties were required to arbitrate their dispute is not before me.

³ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

I thus find that the Claimant is eligible for compensation from the Fund.⁴

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case:

⁴ The OAH file contains a letter dated January 20, 2017, from Robert M. Stahl, Esquire, Respondent's attorney, requesting that the OAH stay this and certain other claims involving MP on the basis that a bankruptcy trustee has been appointed by the United States Bankruptcy Court for the District of Maryland to administer MP's bankruptcy estate. The OAH file also includes a letter dated January 19, 2017, from Assistant Attorney General Joel Jacobson, MHIC's counsel. Mr. Jacobson's letter was a response to a January 5, 2017 letter in which Mr. Stahl requested, on behalf of Respondent, a stay of a different Guaranty Fund claim against Respondent involving MP. The asserted basis for the Respondent's request for a stay was that MP had filed a bankruptcy proceeding. MHIC counsel, Mr. Jacobson, stated in his January 19, 2017 letter to Respondent's counsel that "the United States Bankruptcy Court for the District of Maryland has ruled that the automatic stay provisions of the Bankruptcy Code are not applicable to proceedings by homeowners to recover from the Maryland Home Improvement Guaranty Fund. Therefore, [MHIC] may adjudicate homeowner claims filed with the Guaranty Fund based upon transactions with Maryland Pools, Inc. However, in the event that a claim is paid from the Guaranty Fund, [MP's] bankruptcy filing will stay any collection proceeding against [MP] by the State to recover the Guaranty Fund Payment."

Although neither the Respondent nor his attorney appeared at the March 30, 2017 hearing in this matter, despite due notice, and did not file a motion for a stay or submit a notice of a bankruptcy stay, I will treat Respondent's counsel's January 20, 2017 letter as a motion to stay this proceeding as a result of MP's bankruptcy filing. For the following reasons, I deny the motion for a stay. 11 U.S.C.A. § 362(b)(4) provides that the filing of a bankruptcy petition "does not operate as a stay of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a monetary judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police and regulatory powers." In an unpublished decision, the United States Bankruptcy Court for the District of Maryland held in *In re Michael Goodman*, No. 86-B-1700 (Bankr. D. Md., Aug. 28, 1987) (Order Granting Relief From Stay), that the automatic bankruptcy stay is not applicable to proceedings by homeowners to recover claims against the Maryland Home Improvement Guaranty Fund. See also *In the Matter of the Claim of Patrick Madden Against the Maryland Home Improvement Guaranty Fund for the Alleged Acts or Omissions of Chung Yi, t/a Chung Yi Construction and Design*, OAH No.: DLR-HIC-02-15-07570 (Issued August 27, 2015).

In an analogous case, the United States District Court for the District of Maryland held that the Maryland Racing Commission's police and regulatory power to suspend a debtor's license as a horse trainer was not barred by or stayed under the bankruptcy code. See *In re Christmas*, 102 B.R. 447 (Bankr. D. Md. 1989). See also *Internationale Resort and Beach Club*, 36 B.R. 189 (Bankr. D. S.C. 1983) (plaintiff's claim seeking an award from South Carolina's vacation time sharing recovery fund was an action by a governmental unit to enforce the unit's police or regulatory power and was not subject to bankruptcy court's jurisdiction or to the automatic bankruptcy stay). I am persuaded by the reasoning of these decisions that MP's bankruptcy filing does not require or warrant a stay of this proceeding against the Fund.

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).

Application of this formula is straightforward: The Claimant paid \$70,740.00 to MP, to which is added the \$22,879.02 that the Claimant paid to Wilcoxon and Aquatic Solutions to complete the job, for a subtotal of \$93,619.02, from which the original contract price of \$69,177.00⁵ (for work to be done by MP) must be subtracted, resulting in an actual loss of \$24,442.02.

Pursuant to applicable law, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (2015). The actual loss computed above is \$24,442.02, which exceeds \$20,000.00 by \$4,442.02. Accordingly, the Claimant is entitled to reimbursement from the Fund of only \$20,000.00. *Id.* § 8-405(e)(1).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(2); B (3).

⁵ The reason the contract price is slightly lower than the amount the Claimant paid MP is that MP did not apply certain credits that it promised the Claimant for amounts he paid MP for items that MP and the Claimant subsequently agreed would not be MP's responsibility.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; 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 ten percent (10%) as set by the Maryland Home Improvement Commission;⁶ and

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

Signature on File

May 24, 2017
Date Decision Issued

ROBERT B. LEVIN
Administrative Law Judge

RBL/emh
#168037

⁶ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 10th day of July, 2017, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Sachchida Gupta

***Sachchida Gupta
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION