

~~IN THE MATTER OF THE CLAIM~~ * ~~BEFORE DEBORAH S. RICHARDSON,~~

OF MOHAMMAD JAMAL,

* 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-02-17-08812

RESPONDENT

* MHIC No.: 16 (05) 981

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On September 23, 2016, Mohammad Jamal (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$26,372.00 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 June 20, 2017 at the Kensington location of the Office of Administrative Hearings (OAH). Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself. Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting fifteen minutes for

the Respondent or someone authorized to represent him to appear, I proceeded with the hearing in his 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 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 - Settlement Statement (HUD-1), November 27, 2013

Clmt. Ex. 2 - Letter from Jeffrey Kessler, Pool Tek Services, April 7, 2016

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notice of Hearing, April 17, 2017

Fund Ex. 2 - Hearing Order, March 17, 2017

Fund Ex. 3 - Letter from David Finneran, MHIC To Whom It May Concern, May 25, 2017

Fund Ex. 4 - Home Improvement Claim Form, September 23, 2016

Fund Ex. 5 - Letter from Keyonna Penick, MHIC to the Claimant, March 17, 2017

¹ Notice of the hearing was mailed to the Respondent at the address of record by certified and regular mail on April 17, 2017, COMAR 09.08.03.03A(2). Patricia Spero signed for the notice sent via certified mail on May 4, 2017 and the copy sent via regular mail was not returned unclaimed. Therefore, based on the Court of Appeals' holding in *Golden Sands Club Condominium, Inc. v. Waller*, 313 Md. 484 (1988), I conclude that OAH's notice to the Respondent was adequate under section 8-312(d) of the Business Regulation Article and section 10-209(c) of the State Government Article.

Fund Ex. 7A - Photograph labelled "Only concrete poured," September 2016

Fund Ex. 7B - Photograph labelled "Space for equipment," September 2016

The Respondent did not appear and did not offer any exhibits for admission into evidence.

Testimony

The Claimant testified in his own behalf.

The Respondent did not appear and therefore did not present any testimony.

The Fund did not present any testimony.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject matter of this hearing, the Respondent was a licensed home improvement contractor under MHIC license numbers 01-93100 and 05-6694.
2. In 2007, Sharon Mokhtari was the owner of 11910 Stoney Creek Road in Potomac, Maryland (Property). In 2007, there was a single family home under construction at the Property.
3. On January 17, 2007, Ms. Mokhtari entered into a contract (Contract) with Maryland Pools, Inc., also known as MPM Construction. The Contract was for \$55,780 for a 442 square foot indoor pool within the single family home at the Property.
4. Under the Contract, the Respondent was required to apply for a building permit within seven working days of the date of the Contract. The Contract also provided that construction would be scheduled approximately seven working days after the permit was obtained and would be substantially completed approximately thirty-five working days after completion of excavation, weather permitting.

5. In 2013, the Claimant contracted to purchase the Property for \$1,050,000.

6. In order to clear liens against the Property, at settlement on November 27, 2013, the Claimant paid \$1,195,961.81 for the Property.

7. One of the liens against the Property included in the settlement was a lien for \$25,000 by MPM Construction.

8. No one had ever lived in the Property prior to the Claimant purchasing it in 2013. At the time of settlement, the single family home at the Property was still unfinished. The home was missing appliances and bathroom finishes.

9. When the Claimant purchased the Property in 2013, the swimming pool had been excavated and concrete was poured, but the pool was otherwise incomplete.

10. All parts of this pool are housed inside the new home construction at the Property.

11. On April 7, 2016, the Claimant received a quote from PoolTek Services, a licensed contractor, to complete the construction of the indoor swimming pool at the Property. PoolTek's quote was for \$40,152.

12. The Claimant filed his Claim on September 23, 2016.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

~~An owner may recover compensation from the Fund "for an actual loss that results from~~

an act or omission by a licensed contractor." Md. Code Ann., Bus. Reg. § 8-405(a) (2015);² *see also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a licensed contractor"). 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.

Claimant's position

The Claimant argues that Ms. Mokhtari purchased the Property in 2007. That same year, Ms. Mokhtari contracted with the Respondent to build an indoor pool at the single family home under construction at the Property for \$55,780. The Claimant testified that Ms. Mokhtari informed him that she paid \$17,000.00 towards the Contract.

The Claimant purchased the Property in 2013. At that time, he was required to pay several liens as part of settlement that went beyond the original contract price for the Property. One of those liens was in favor of MPM Construction for \$25,000. The Claimant argues that paying off this \$25,000 lien was the equivalent of making a payment under the Contract for the indoor swimming pool. Thus, he argues that the Respondent has been paid \$42,000 (\$17,000 from Ms. Mokhtari + \$25,000 from the lien payment).

When the Claimant purchased the Property in 2013, the swimming pool, like much of the house, was unfinished. The Claimant testified that he spoke with the Respondent, who told him he remembered this job. The Respondent informed the Claimant it might cost additional money to complete the job and he would have to work up an amount to finish the job. However, the Respondent never followed up and did not answer emails or phone calls.

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

Eventually, the Claimant had PoolTek Services, a licensed home improvement contractor, provide an estimate for the completion of the swimming pool construction, under the same specifications called for under the original Contract. PoolTek estimated it would cost \$40,152 to complete the swimming pool construction.

Thus, the Claimant alleges that the Respondent provided only \$15,628 worth of work (contract amount of \$55,780.- \$40,152 to complete) although it was paid \$42,000.

Fund's position

The Fund argues first that the Claimant did not contract directly with the Respondent and is therefore not in a position to be compensated by the Fund. Even assuming there is privity of contract, the Fund further argues that the Claimant has not established that the Respondent was paid either \$17,000 by the former owner of the Property or \$25,000 by the Claimant himself. The Fund also argues that this contract does not qualify as a home improvement contract under the statute. And finally, the Fund argues that the Claimant has filed this claim beyond the three year statute of limitations.

I agree with the Fund on several of these arguments and explain below why the Claimant is not entitled to compensation.

Analysis

The Claimant has provided no evidence that Ms. Mokhtari paid the Respondent \$17,000. Moreover, although the HUD-1 settlement statement with respect to the Property shows that the Claimant paid off a \$25,000 lien in favor of MPM Construction at settlement, it is not clear that was with respect to the swimming pool Contract. Claimant's Exhibit 1 only shows that the Claimant paid off a \$25,000 lien. It does not explain in any way the facts behind that lien. Thus, it is unclear what, if anything, beyond a \$1,000 deposit, (see Fund Ex. 6A), was paid towards the Contract.

~~It is also unclear whether this was a home improvement contract, which would make the~~

Claimant eligible for compensation for the Fund, or whether this was a contract for construction of a new home, which is specifically excluded from eligibility. Section 8-101 of the Business Regulation Article defines a home improvement, in relevant part, as follows:

(1) "Home improvement" means:

- (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.

(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;

...

(3) "Home improvement" does not include:

- (i) construction of a new home;

Md. Code Ann., Bus. Reg. § 8-101(g) (Supp. 2016).

By contrast, section 4.5-101 of the Business Regulation Article defines a new home contract as "an agreement between a home builder and a consumer for the sale or construction of a new home." Md. Code Ann., Bus. Reg. § 4.5-101(n). A new home is defined as a "newly constructed residential dwelling unit in the State and the fixtures and structure that are made a part of a newly constructed private dwelling unit at the time of construction." *Id.* at § 4.5-101(m).

While a swimming pool certainly fits squarely within the definition of "home improvement," the Fund argued that this indoor swimming pool, housed within the four corners of the original plan of the house, was one of the fixtures of the original construction of a new home. The schematics for the pool attached to the Contract indicate "house under construction." (Fund. Ex. 6A). While the Claimant testified that no one ever occupied the house before he purchased it in 2013, and he estimated that the house was 75% complete when he purchased it,

I was provided with no testimony about whether a certificate of occupancy was ever issued for the Property. It is unclear whether the home was "complete" and the swimming pool was an addition, or whether the swimming pool was part of the original construction of the home. In any event, I am not required to determine this threshold issue, because the Claimant is otherwise not entitled to compensation from the Fund because he has filed his claim beyond the statute of limitations.

Assuming, without deciding, that the Claimant acquired the rights under the Contract, by virtue of having purchased the home and having paid a lien, he was entitled to the benefits of the Contract, i.e. that it be workmanlike and completed. If the Claimant argues, as he does, that he is entitled to the benefits of a Contract entered into in 2007, he must also be limited by the same constraints placed upon Ms. Mokhtari who, but for the Claimant's purchase of the Property, would have been the claimant. One of those constraints is the statute of limitations.

The Business Regulation Article requires that a claim be brought against the Fund within three years after the claimant discovered or, by the use of ordinary diligence, should have discovered the loss or damage. Bus. Reg. § 8-405(g). The crux of the Claimant's complaint is that the Respondent failed to complete the work as required by the January 17, 2007 Contract. The Contract provides a construction schedule as follows: the Respondent was required to apply for a building permit within seven working days of the date of the Contract. Construction was then to be scheduled approximately seven working days after the permit was obtained and was to be substantially completed approximately thirty-five working days after completion of excavation. Ms. Mokhtari knew long before the sale of the Property in 2013, that the Respondent had not completed the work under the Contract. The statute of limitation had long since run by the time the Claimant purchased the Property. He cannot revive a claim, which already expired, by purchasing the Property in 2013.

~~Thus, the Claimant's September 23, 2016 claim fails beyond the three-year limitation~~

period and, as a result, he is not eligible for compensation from the Fund. Md. Code Ann., Bus. Reg. § 8-405(g). It is well-settled that timeliness is jurisdictional; if an appeal is not filed within the required time frame, no jurisdiction is acquired and the appeal must be dismissed. *Walbert v. Walbert*, 310 Md. 657 (1987). Having so concluded, I am prohibited from reaching the merits of the case in this decision.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant did not file the Claim within three years from the date that the Claimant or his predecessor discovered, or by exercise of ordinary diligence should have discovered, the loss or damage that constitutes the Claim. Md. Code Ann., Bus. Reg. § 8-405(g) (2015); COMAR 09.08.03.02G.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's guaranty fund claim; and

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

Signature on File

September 11, 2017
Date Decision Issued

Deborah S. Richardson
Administrative Law Judge

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