

IN THE MATTER OF THE CLAIM
OF JAMES HERRON,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF ROBERT SPERO,
T/A MARYLAND POOLS, INC.,
RESPONDENT

* **BEFORE JENNIFER A. NAPIER,**
* **AN ADMINISTRATIVE LAW JUDGE**
* **OF THE MARYLAND OFFICE**
* **OF ADMINISTRATIVE HEARINGS**
* **OAH No.: DLR-HIC-02-17-16505**
* **MHIC No.: 17 (75) 353**
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PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On September 20, 2016, James Herron (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC or Commission) Guaranty Fund (Fund) for reimbursement of \$8,905.05¹ in alleged actual losses suffered as a result of a home improvement

¹ During the hearing, the Claimant amended his claim to \$12,829.05. However, the basis of the claim remained the unchanged. The Fund did not object to the amendment and took the position that the amendment would not prejudice the Respondent. The Respondent did not appear for the hearing. I find the Respondent is not prejudiced by amendment of the claim amount at the hearing. The basis of the Claimant's claim remains unchanged and would have been clear to the Respondent upon review of the Claimant's Complaint form, his Claim Form and the documents he submitted pursuant to the MHIC's investigation of this matter. Further, the Respondent has filed for bankruptcy and closed its business. Therefore, based upon a lack of prejudice to the Respondent, I will permit the Claimant to amend his Claim. See Code of Maryland Regulations (COMAR) 09.08.03.02C(2).

contract with Maryland Pools, Inc., (Respondent or Maryland Pools).² After an investigation, the Commission issued a Hearing Order on May 23, 2017 and forwarded the case to the Office of Administrative Hearings (OAH).

I held a hearing on August 18, 2017 at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself. Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Neither the Respondent, nor his attorney, appeared for the hearing. After waiting over twenty minutes for the Respondent or someone representing him to appear, I proceeded with the hearing.³ Code of Maryland Regulations (COMAR) 28.02.01.23A.

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. 2017); 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?

² The holder of the Respondent's MHIC license is Robert Spero. Therefore, the case name reflects Robert Spero, t/a Maryland Pools, Inc., as the Respondent.

³ Notice of the hearing was mailed to the Respondent's business address by regular and certified mail on June 19, 2017. COMAR 09.08.03.03A(2). The United States Postal Service returned both copies of the notice to the OAH. HIC GF Ex. 1. On August 4, 2017, the OAH mailed a copy of the Notice to the Respondent at his home address. HIC GF Ex. 1; See HIC Ex. GF-5. That copy of the notice was not returned to the OAH. On June 19, 2017, the OAH also mailed a copy of the Notice by certified mail to the Respondent's attorney, Robert M. Stahl, Esquire. Mr. Stahl's office received the Notice on June 21, 2017. See OAH docket entry #2.

SUMMARY OF THE EVIDENCE

Exhibits

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

- CL Ex. 1 Maryland Pools Contract, November 20, 2013
- CL Ex. 2 Claimant statement with calculation of damages, undated
- CL Ex. 3 Letter contract addendum, April 20, 2014
- CL Ex. 4 Photo of missing portion of concrete shell on the pool wall, undated⁴
- CL Ex. 5 Under the Sun proposal, undated
- CL Ex. 6 Copy of a check written to Robert Button, June 26, 2016
- CL Ex. 7 Copy of a check written to Steve Myer, June 25, 2016
- CL Ex. 8 Woodfield Landscaping proposal, September 16, 2016

I admitted the following exhibits on behalf of the Fund:

- HIC GF Ex. 1 Notices of Hearing, August 4, 2017 and June 19, 2017; OAH Memo, July 14, 2017, with attached returned mail, received July 12, 2017; OAH Memo, July 28, 2017, with attached returned mail, received June 26, 2017;
- HIC GF Ex. 2 Transmittal form, undated; Hearing Order, May 23, 2017; Home Improvement Claim Form, September 20, 2016
- HIC GF Ex. 3 MHIC Licensing Information for the Respondent, printed July 31, 2017
- HIC GF Ex. 4 Home Improvement Claim Form, September 20, 2016
- HIC GF Ex. 5 Email from Thomas Marr to Jessica Kaufman, August 3, 2017

No exhibits were offered on the Respondent's behalf.

⁴ The Appellant testified that the photo was taken around late March 2014.

Testimony

The Claimant testified on his own behalf and presented the testimony of his wife, Joan Herron. The Fund did not present any witnesses. No one appeared to testify on behalf of the Respondent.

PROPOSED FINDINGS OF FACT

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

1. At all relevant times, the Respondent was a licensed home improvement contractor under MHIC license number 93100.
 2. At all relevant times, the Claimant was the owner of a home located on Flora Meadows Drive in Forest Hill, Maryland, which is his personal residence. The Claimant owns no other residential properties in Maryland.
 3. Neither the Claimant, nor his wife, is an employee, officer or partner of the Respondent, or related to any of the Respondent's employees, officers or partners.
 4. On November 20, 2013, the Claimant and the Respondent entered into a contract for construction of an Aruban swimming pool (Contract) at the Claimant's residence. The pool was to be twenty-one feet in width at its widest point and thirty-seven feet in length at its longest point, with a water depth ranging from three feet to eight feet. The Contract provided that the pool shell would consist of pneumatically applied concrete and that the pool interior would be finished with a waterproof, hand troweled plaster finish.
 5. The original agreed-upon Contract price was \$70,949.00.
 6. The Contract required the Claimant to pay a \$2,000.00 deposit at the time of the Contract. The Contract provided for the following cash payment schedule for the balance of the Contract price:
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- \$14,934.00 due at the time of excavation
- \$20,534.00 upon completion of pneumatically applied concrete shell
- \$1,867.00 due prior to application of the interior finish.

7. The Contract did not contain a specific start or completion date. However, the Contract contained the following: “[the Respondent] shall apply for a building permit within 30 working days from the date of this contract. If contract requires financing, the building permit will be applied for within 7 working days after notification of approval of financing. Construction shall be scheduled approximately 7 working days after permit has been obtained and shall be substantially completed approximately 35 working days after completion of excavation, weather permitting.”

8. The Respondent began to perform work under the Contract around December 2013.

9. In late March 2014, the Respondent applied the concrete pool shell. Approximately two days later, a portion of the concrete pool shell fell off the wall of the pool.

10. Sometime after the shotcrete⁵ failure on the pool wall, the Respondent repaired the concrete pool shell.

11. On June 5, 2014, the Claimant and the Respondent agreed to an addendum to the Contract, specifying that in the event of a pool shell failure, the items directly impacted by the pool shell failure would be covered under the Maryland Pools warranty; and the current warranty would be expanded to also cover cleaning and refilling of the pool in relation to pool shell repairs for a period of five years from the date of pool delivery. No additional costs were associated with the Contract addendum.

⁵ Shotcrete is concrete which is pneumatically applied using a hose.

12. The Respondent completed work on the pool by June 23, 2014.

13. The Claimant paid the Respondent for the pool in full.

14. In 2015, the Claimant began to have problems with the pool plaster which was applied over the concrete shell. Pieces of rusty reinforcing bars were protruding through the plaster and portions of the concrete were visible.

15. Sometime prior to June 2016, the Respondent had filed for bankruptcy and closed its business. The Claimant became aware of this after viewing newscasts about the closure of the Respondent's business.

16. In June 2016, the Claimant started to observe etching of the pool—the plaster became so rough and sharp that the Claimant's children cut their feet on the pool.

17. In order to mitigate the etching of the pool, the Claimant hired a pool contractor, Under the Sun, to perform an acid wash and pressure wash on the pool. Under the Sun first drained the pool and then acid and pressure washed the plaster on the entire pool.

18. On June 29, 2016, the Claimant paid Under the Sun \$1,500.00 for the acid and pressure washing.

19. The Claimant had the pool refilled by Robert Button and paid him \$1,212.00 for that service on June 26, 2016.

20. The acid and pressure washes helped cure the problem with the etching of the pool, but did not cure the issues with the visible rebar and concrete. After the acid and pressure washes, there were still chunks of plaster falling off the side of the pool.

21. In September 2016, the Claimant contacted Woodfield Landscaping ("Woodfield") to obtain an estimate for repairing the pool plaster. On September 16, 2016, after inspecting the pool, Woodfield determined that it would be necessary to drain the pool, apply scratch coat and plaster, and immediately refill the pool with water.

22. The Claimant has not yet had the pool repaired, but intends to contract with Woodfield to perform the repair work.

23. Woodfield is a licensed home improvement contractor.

24. The Claimant does not normally drain the pool at the end the summer, as he has been advised that it is not recommended to drain the pool, because it may impact the structural integrity of the pool in the winter months. To winterize the pool, the Claimant simply lowers the level of the pool water by about four or five inches and winterizes the piping. When reopening the pool, he then tops off the water himself.

25. The Contract contains an arbitration clause. The Claimant and his wife each signed the Contract under the arbitration clause, but did not affix a date next to their signatures. The Respondent did sign the Contract under or near the arbitration clause.

DISCUSSION

Legal Framework

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)).

A claimant 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);⁶ *see*

⁶ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

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. However, the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney’s fees, court costs, or interest, and may not compensate a claimant for more than was paid to the original contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(1).

Certain claimants are excluded from recovering from the Fund altogether. In this regard, a claimant must prove that: (a) the claimant resides in the home as to which the claim is made, or he owns no more than three dwelling places; (b) the claimant is not an employee, officer or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor’s employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the claimant did not unreasonably reject the contractor’s good faith effort to resolve the claim; (e) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (f) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (g) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1); Md. Code Ann., Bus. Reg. § 8-101(g)(3)(i) (Supp. 2016).

For the reasons that follow, I find that the Claimant has proven eligibility for compensation.

Statutory Eligibility

The undisputed evidence in this case establishes there are no *prima facie* impediments barring the Claimant from recovering from the Fund. *Id.* The Claimant filed his Claim within three years of learning of the defects in the concrete shell and plaster coating his pool. The Claimant testified that the home improvement work at issue in this case concerned his pre-existing personal residence in Maryland, which is the only dwelling he owns; neither he nor his wife were an employee, officer or partner of the Respondent and neither he, nor his wife are related to any of the Respondent's employees, officers or partners; by the time the Claimant sought to have the issues with his pool corrected, the Respondent had already filed for bankruptcy and closed its business, thus the Respondent made no effort to resolve the Claim in this matter; and the Claimant has not taken any other legal action to recover monies for the Respondent's poor workmanship.

The remaining prerequisite under section 8-405 of the Business Regulation Article is the requirement that the Claimant complies with the arbitration clause contained in the Contract before seeking compensation from the Fund. In order to be enforceable, an arbitration clause in a home improvement contract must contain: (1) the name of the person or organization that will conduct the arbitration; (2) whether any mandatory fees will be charged to the parties for participation in the arbitration and include the fee schedule; (3) whether the arbitrator's findings are binding; *and* (4) a disclosure that, under Business Regulation Article, §8-405(c), Annotated Code of Maryland, a claim against the Fund by an owner shall be stayed until completion of any mandatory arbitration proceeding. COMAR 09.08.01.25A. In addition, the parties shall affix their initials and date immediately adjacent to any mandatory arbitration clause in a home improvement contract, at the time of execution of the contract. COMAR 09.08.01.25B.

The arbitration clause contained in the Contract states, in pertinent part, as follows:

Any controversy, action, claim, dispute, breach or question of interpretation relating to or arising out of this contract shall be resolved by arbitration in accordance with Commercial Arbitration Rules of the American Arbitration Association and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction.

The costs of arbitration shall be borne by the losing party or shall be borne in such proportions as the arbitrators determine ...

Under Business Regulation Article [§]8-405(c) Annotated Code of Maryland, a claim against the Home Improvement Guaranty Fund by an owner shall be stayed until completion of any mandatory arbitration proceeding.

CL Ex. 1. The arbitration clause also includes a fee schedule. *Id.*

Based on the evidence in the record, I find that the arbitration clause fails to fully comply with the provisions of COMAR 09.08.01.25A. The arbitration clause does not contain the name of the person or organization that will conduct the arbitration, nor does it address whether the arbitrator's findings are binding, COMAR 09.08.01.25A. Further, only the Claimant and his wife affixed their signatures immediately adjacent to the arbitration clause, and those signatures are not dated. COMAR 09.08.01.25B. Failure to comply with any one of the provisions of COMAR 09.08.01.25A or B is sufficient to render an arbitration clause unenforceable. *See* COMAR 09.08.01.25A, B. Since the arbitration clause contained in the Contract is unenforceable, the Claimant is not required to comply with the clause and it was appropriate for the MHIC to forward this Claim for a merits hearing.⁷

⁷ COMAR 09.08.03.02E provides that when a contract between a claimant and a contractor requires that all contract disputes be submitted to binding arbitration, the claimant shall either submit their dispute to binding arbitration as required by the contract; or provide evidence to the MHIC that the claimant has made good faith efforts to bring the dispute to binding arbitration which the contractor has either rejected or not responded to. Since the arbitration clause in this case does not indicate that arbitration would be binding, I find that this regulation does not apply in this case.

Was the Home Improvement Unworkmanlike, Inadequate or Incomplete?

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. There is no allegation that the home improvement work performed by the Respondent was incomplete. However, the undisputed evidence establishes that the Respondent's application of the concrete shell and pool plaster was unworkmanlike and/or inadequate.

The Claimant testified that in 2015, the year after the pool was completed, he began to observe problems with the pool's plaster and concrete shell—portions of the reinforcing bars and concrete which were to be completely covered by plaster finish had become visible. The Claimant further testified that by June 2016, the plaster finish had become so rough and sharp that his children cut their feet while walking on the surface. The Claimant submitted as evidence Woodfield's September 16, 2016 proposal to perform the necessary repair work on the pool. CL Ex. 8. The proposal indicates that when Woodfield inspected the pool, there was concrete showing through the plaster in many areas throughout the pool. Although the Claimant did not present photos of any of the problems he experienced with the plaster after completion of the pool, I find that his credible testimony combined the statements in the Woodfield proposal, is sufficient evidence to establish that concrete was visible through the plaster as of September 2016.

Even to a layperson, it is clear that this amounts to an inadequate and/or unworkmanlike home improvement—it is completely unreasonable for a pool's concrete shell and plaster finish to begin to deteriorate in such a fashion within a year of its construction. The problems the Claimant experienced just two days after the concrete shell was applied are further evidence that the Respondent's work was inadequate and/or unworkmanlike. The Claimant submitted as

evidence a signed copy of the June 5, 2014 addendum⁸ to the Contract which references the “pool shell failure and repair by [Maryland Pools]” and was created to provide greater warranty coverage for the pool shell, in light of the pool shell failure. CL Ex. 3.

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

Amount of Actual Loss

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. 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.

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).

In this matter, the Claimant paid the Respondent \$70,949.00, the full amount required by the original Contract. As a result of the Respondent’s inadequate and/or unworkmanlike construction of the pool, the Claimant incurred the costs of acid and pressure washing, then refilling the pool. See CL Exs. 5, 6, & 7. The Woodfield proposal indicates that further repairs are necessary to fix the pool plaster, and that it would charge the Claimant \$8,905.05 to perform that repair work. CL Ex. 5. The Woodfield proposal further indicates that the pool must be

⁸The addendum is dated April 20, 2014, which is the date that the Claimant original presented the Respondent with the addendum. However, the terms of the addendum were not agreed to and signed by Mr. Spero until June 5, 2014. CL Ex. 3.

completely drained in order for the necessary repairs to be made, thus the Claimant will also incur the expense of having the pool refilled once again.

Based on the foregoing, the Claimant's actual loss is as follows:

Amount paid to Respondent	\$ 70,949.00
Amount paid to Under the Sun	\$ 1,500.00
Amount paid to Mr. Button (1st pool refill)	\$ 1,212.00
Amount to be paid to Woodfield	\$ 8,905.05
<u>Amount to be paid to Mr. Button (2nd pool refill)</u>	<u>+\$ 1,212.00</u>
TOTAL	\$ 83,778.05
<u>Contract Price</u>	<u>- \$ 70,949.00</u>
Actual Loss	\$ 12,829.05

The amount of the Claimant's actual loss is within the statutory cap on claims against the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (e)(5). Thus, the Claimant's recovery is for the full amount of his actual loss, \$12,829.05.

This case is only one of many against the Respondent. Section 8-405(e)(2) of the Business Regulation Article provides for a statutory cap of \$100,000.00 to cover all claimants for the acts or omissions of one contractor, unless the contractor reimburses the Fund. Thus, although I recommend an award of \$12,829.05 to the Claimant, this award may be limited by the statutory cap of section 8-405(e)(2).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss as a result of the Respondent's acts and omissions, and that an appropriate award in this case is \$12,829.05 subject to any limitations imposed by section 8-405(e)(2) of the Business Regulation Article. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$12,829.05, unless otherwise limited by section 8-405(e)(2) of the Business Regulation Article; and; 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;⁹ and

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

Signature on File

November 16, 2017
Date Decision Issued

Jennifer A. Nappier
Administrative Law Judge

JAN/sw
169315

⁹ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 25th day of January, 2018, 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.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION