

IN THE MATTER OF THE CLAIM
OF STEVEN GORSUCH,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JEROD WILKS
T/A PRECISION POOLS LLC,
RESPONDENT

* BEFORE STUART G. BRESLOW,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: LABOR-HIC-02-19-24109
* MHIC No.: 19 (05) 484

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PROPOSED DECISION

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STATEMENT OF THE CASE

On December 26, 2018, Steven Gorsuch (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$5,500.97 in actual losses allegedly suffered as a result of a home improvement contract with Jerod Wilks, trading as Precision Pools LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401

through 8-411 (2015 & Supp. 2019).¹ On July 26, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on November 22, 2019 at the OAH. Md. Code Ann., Bus. Reg. § 8-407(e). Andrew Brouwer, Assistant Attorney General, Department of Labor (Department),² represented the Fund. The Claimant represented himself. After waiting twenty minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.³

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. 2019); 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 - Home Improvement Contract between the Claimant and the Respondent for the construction of an in-ground concrete swimming pool, dated July 19, 2017

¹ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

² On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

³ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on September 3, 2019, COMAR 09.08.03.03A(2), and the certified mail was returned as unclaimed/undeliverable on October 9, 2019. Counsel for the Respondent also received a copy of the Notice of hearing sent on September 3, 2019. Counsel for the Respondent struck his appearance on behalf of the Respondent on September 9, 2019. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter.

- Clmt. Ex. 2 - Copies of eight checks payable to the Respondent in the total amount of \$124,000⁴
- Clmt. Ex. 3 - Invoices from Gallagher Pools and Spas for pool and spa covers, and closing of the pool for \$7,040.68 plus \$85.29 for a plumbing repair
- Clmt. Ex. 4 - List of punchlist items, updated September 22, 2018
- Clmt. Ex. 5 - Email string between Claimant and Respondent, dated June 14, 2018

No documents were offered on behalf of the Respondent.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Hearing Order, dated July 19, 2019
- Fund Ex. 2 - Notice of Hearing, dated September 3, 2019
- Fund Ex. 3 - Home Improvement Claim Form, dated December 15, 2018
- Fund Ex. 4 - Licensing history of Respondent, printed November 20, 2019

Testimony

The Claimant testified and presented no other witnesses.

The Fund presented no 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 01.95239.
2. On July 19, 2017 the Claimant and the Respondent entered into a contract (Contract) to construct a concrete pool and spa on the Claimant's residential property located in Manchester, Maryland (Project). The Contract provided that work would begin on or about August 7, 2017 and would be substantially completed by October 7, 2017.

⁴ The account numbers have been redacted for confidentiality purposes.

3. The original agreed-upon Contract price was \$119,450.00. Additions to the Contract agreed to by the parties increased the total Contract price to \$125,625.00.

4. The Claimant paid the Respondent a total of \$124,000.00 over the course of the Contract.

5. Work began on the Project as anticipated by the parties. Due to weather concerns and the approaching winter months, the parties agreed that work on the Project would be suspended during the winter of 2017-2018, but would resume in the spring of 2018 when weather improved.

6. In May of 2018, the Respondent, through his authorized subcontractor, installed the first finish coating to the interior of the pool and spa. It was not installed properly and had to be jack hammered out and redone. This caused further delay in the Project.

7. Despite the delay, the pool was filled with water in June 2018. The Claimant was charged \$700.00 and paid for a load of water that was included under the Contract, but not supplied by the Respondent. During that same month, the Claimant provided a punchlist of items that needed to be repaired or completed. The Respondent advised the Claimant by email that he would address the punchlist items, but despite several emails requesting that the Respondent address the problems, the Respondent never did. The Respondent complained to the Claimant that he was very busy and this caused the delay in completing the Project following the winter of 2017-2018.

8. As a result of the Respondent's lack of response, the Claimant became concerned as the summer progressed that the Respondent may not install the custom pool and spa covers and close the pool before the fall, all part of the responsibility of the Respondent according to the terms of the Contract.

9. Finally, the Respondent appeared at the Claimant's property to take measurements for the custom pool cover and spa cover that he would need to install as part of the pool closing for the fall.

10. The Respondent agreed to revisit the Claimant's property on either September 25 or September 26, 2018 to install the covers and close the pool. The Respondent did not honor his commitment and did not return to the property.

11. By the end of September, fall had arrived and leaves began falling from trees. The Claimant's property is located in a heavily wooded area. Leaves were beginning to fill the pool and there was no indication that the Respondent would ever return to the property to complete the Project.

12. The Claimant gave the Respondent an ultimatum requiring that the Respondent complete the Project as specified in the Contract or he would be left with no choice but to cancel the Contract. Having not received a response from the Respondent, the Claimant cancelled the Contract on or about September 26, 2018.

13. The Claimant contacted Gallagher pools to have them obtain pool covers, install them and close the pool.

14. There is a company in Baltimore that specializes in manufacturing custom pool covers. This is the company the Respondent selected to manufacture the pool and spa covers. Before ordering the custom pool covers, Gallagher inquired whether the pool covers for the Claimant's pool and spa were ordered by the Respondent. None were ordered by the Respondent.

15. Gallagher was chosen by the Claimant to order and install the pool and spa covers and close the pool for the winter. These items were part of the Contract that the Respondent failed to perform.

16. The Claimant paid Gallagher a total of \$7,040.68 for the pool and spa covers and for closing the pool for the winter plus \$85.29 for the repair of the plumbing that was included in the punchlist items. These items were part of the Contract that the Respondent failed to complete.

17. At the time the Claimant cancelled the Contract, the Claimant owed the Respondent \$1,625.00, which is still due and owed to the Respondent.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1); 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); *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 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.

The Respondent performed unworkmanlike, inadequate or incomplete home improvements. The Contract is clear that the Respondent had the responsibility to fabricate and install the pool and spa covers. The Respondent also was obligated under the Contract to close the pool. None of these contractual items were performed by the Respondent; therefore, the work the Respondent performed was incomplete. The Claimant, having contacted the Respondent numerous times to complete the Project without success, notified the Respondent that he was canceling the Contract.

Subsequently, following the Contract cancellation, the Claimant contracted with Gallagher Pools and Spas to complete the work the Respondent failed to perform under the Contract. The custom pool and spa covers were ordered and installed by Gallagher and one punchlist plumbing item was also fixed by Gallagher Pools and Spas. The other punchlist items were remediated by the Claimant at no charge to the Respondent.

For work performed by Gallagher, which was not performed by the Respondent under the Contract, the Claimant was charged and paid \$7,040.68 to Gallagher. In addition, the Respondent paid Gallagher \$85.29 for the plumbing work that the Respondent failed to repair.

As a result of the Respondent's failure to complete the Project and fix the plumbing issue on the punchlist, I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed some work under the Contract, and the Claimant retained Gallagher Pools and Spas to complete and remediate that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

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).

Applying the formula to this case, the Claimant paid \$124,700.00 to the Respondent under the Contract. Added to this figure is the amount of \$7,125.97 the Claimant paid Gallagher Pools and Spas for the pool and spa covers and for closing the pool. This expense, added to the amount paid by the Claimant results in a total amount of \$131,825.97. From this amount, the adjusted Contract price of \$125,625.00 is subtracted under the formula, yielding a total actual loss of \$6,200.97.

The Claimant claimed an actual loss of \$5,500.97. I have determined that he has proven an actual loss of \$6,200.97. However, he is only entitled to receive \$5,500.97 from the Fund.

Once a verified claim has been filed with the Commission, the claimant may not amend the claim unless the claimant can establish to the satisfaction of the Commission that either the:

(1) Claimant did not know and could not have reasonably ascertained the facts on which the proposed amendment is based at the time the claim was filed; or

(2) Claimant's proposed amendment would not prejudice the contractor whose conduct gave rise to the claim.

COMAR 09.08. 03.02

The Claimant knew the actual amount paid for the work that was incomplete and remediated at the time he filed his claim. Furthermore, the Respondent would have no way of knowing that the claim was amended at the hearing as he was not present. Therefore, he would be prejudiced if the Claimant was allowed to recover his actual loss of \$6,200.97.

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled recover his claimed amount of \$5,500.97 and not his actual loss of \$6,200.97.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss \$6,200.97 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(3)(b). I further conclude that the Claimant is entitled to recover \$5,500.97 from the Fund as that was the amount of the Claimant's claim and awarding the Claimant's actual loss of \$6,200.97 would result in prejudice to the Respondent. COMAR 09.08. 03.02.

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$5,500.97, 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,⁵ and

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

January 8, 2020
Date Decision Issued

CONFIDENTIAL

Stuart G. Breslow
Administrative Law Judge

SGB/cj
#183254

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 10th day of February, 2020, 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.

Robert Altieri

Robert Altieri

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***