

IN THE MATTER OF THE CLAIM * BEFORE BRIAN ZLOTNICK,
OF JOHN NOVAK, CLAIMANT * AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME * OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND * OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR *
OMISSIONS OF ROBERT SPERO, *
T/A MARYLAND POOLS, INC., *
RESPONDENT * OAH No.: DLR-HIC-02-16-36044
*** MHIC No.: 15 (05) 1238**

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On September 23, 2015, John F. Novak, (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$19,015.00 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 March 16, 2017 at the Office of Administrative Hearings, 11101 Gilroy Road, Hunt Valley, 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 twenty minutes past the scheduled time, the Respondent and his attorney of record, Robert M. Stahl, Esquire, did not appear for the hearing, 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. Should this claim be stayed on the basis that a bankruptcy trustee has been appointed by the United States Bankruptcy Court for the District of Maryland to administer Maryland Pool's bankruptcy estate?
2. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
3. 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 – Pool Resurfacing Contract, dated April 23, 2012

Clmt. Ex. 2 – Email chain between the Claimant and the Respondent; dated April 25, 2014 to May 7, 2014

Clmt. Ex. 3 – Contract with Wilcoxon Construction, Inc., dated June 16, 2015

Clmt. Ex. 4 – Amended Contract with Wilcoxon Construction, Inc., dated July 1, 2015

Clmt. Ex. 5 – TEM Trucking, Inc. Invoice, dated July 15, 2015

¹ Notices of the hearing were mailed to the Respondent and Mr. Stahl by OAH on December 29, 2016, by certified mail, to their addresses of record, COMAR 09.08.03.03A(2). The certified mail receipts for the Notices of Hearing were signed by Patti Spero as agent for the addressee and N. Lyons as agent for Mr. Stahl. The signed receipts were received by OAH on January 3 and 6, 2017.

Clmt. Ex. 6 – Wilcoxon Construction, Inc. Invoice, dated June 8, 2015

Clmt. Ex. 7 – Wilcoxon Construction, Inc. Invoice, dated July 29, 2015, with attached credit card payment receipt

Clmt. Ex. 8 – Photograph of pool, taken in March 2015

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 – Notice of Hearing, dated December 29, 2016

Fund Ex. 2 – State Department of Assessment and Taxation (SDAT) printout, dated March 15, 2017

Fund Ex. 3 – Notice of Hearing, dated December 29, 2016, with attached certified mail receipts

Fund Ex. 4 – Hearing Order, dated October 17, 2016

Fund Ex. 5 – MHIC Licensing Information for the Respondent and MP, showing licensing status that was valid from October 29, 2007 to October 29, 2015

Fund Ex. 6 – Home Improvement Claim Form, dated September 22, 2015

Fund Ex. 7 – Letter from DLLR to the Respondent, dated September 29, 2015

Testimony

The Claimant testified on his own behalf. The Fund did not present any 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 4466000 trading as Maryland Pools, Inc. (MP).

2. The Respondent conducted a swimming pool construction business under the trade name of MP.

3. On April 23, 2012, the Claimant and the Respondent entered into a contract (Contract) to resurface the Claimant's existing pool which included the installation of a Diamond Bright Super Blue Pool Finish. The Respondent completed the resurfacing job in July 2012.

4. The Contract included a warranty (Warranty), which provided a three-year full replacement value coverage for the resurfacing work the Respondent performed on the Claimant's pool.

5. The agreed-upon contract price for the work and materials to be provided by the Respondent pursuant to the Contract was \$8,300.00.

6. The Claimant paid the Respondent a total of \$8,300.00.

7. The Claimant first noticed problems with the surface of the pool in March 2014.

8. On April 25, 2014, the Claimant e-mailed the Respondent informing him of a large crack in the steps of the pool. The surface of the pool had begun to flake off in April 2014. In May 2014, the Respondent performed a temporary fix to the cracked steps and agreed to permanently fix the surface of the pool the following year in April 2015.

9. In May 2015, Julie, one of the Respondent's employees, spoke with the Claimant by phone and informed him that the owner of MP, Robert Landon, had passed away and that the Respondent would not go forward with any additional repairs on the Claimant's pool. The Claimant's last contact with the Respondent was his May 2015 conversation with Julie.

10. The Respondent did not repair the cracked surface of the pool that he installed in July 2012.

11. To make the necessary repairs to his pool, the Claimant contracted with Wilcoxon Construction, Inc. (Wilcoxon), a MHIC-licensed contractor, on June 18, 2015.

12. The Claimant paid Wilcoxon \$3,760.00 to strip the plaster to the pool shell and \$6,455.00 to prepare the pool for installation of a Diamond Brite aggregate pool finish for a total

cost of \$10,215.00. The Respondent's installation of a Diamond Brite aggregate pool finish had failed as the surface began flaking and cracking less than three years after it was installed by the Respondent.

13. The Claimant's payment to Wilcoxon was for work that the Respondent was required to perform under the Warranty clause of the Contract, for which the Claimant paid the Respondent, but which the Respondent failed to perform.

14. The Claimant also paid Wilcoxon an additional \$7,390.00 to remove and reset all flagstone coping, remove existing waterline tile and install a new waterline tile and caulk the expansion joint between the coping stones and pool deck. This payment was for work that was beyond the scope of the Contract.

15. The Claimant's actual loss as a result of the Respondent's failure to make necessary repairs to the pool is \$8,300.00.

16. The Respondent and his attorney, Robert Stahl, Esquire, were notified of the March 16, 2017 hearing through regular and certified mail. Representatives for the Respondent and Mr. Stahl signed their respective certified mail receipts acknowledging receipt of their notice of hearing.

DISCUSSION

The Respondent's failure to appear

As discussed in the Findings of Fact above, the OAH mailed the Notice regarding the date, time and location of this hearing, via both First Class and Certified Mail, to the Respondent, individually and as the representative of MP, to his personal home address. The Notice was also mailed, via both First Class and Certified Mail, to Mr. Stahl, the attorney representing the Respondent. The Certified Mail Notices were signed as received by someone at both the Respondent's and Mr. Stahl's address.

On March 16, 2017, at 9:30 a.m., I convened a hearing in this case at the OAH in Hunt Valley, Maryland. By 9:50 a.m., neither the Respondent, nor anyone claiming to represent the Respondent, appeared for the hearing. The OAH did not receive any request for postponement of the hearing.

The Respondent was properly notified of the date, time and location of this hearing. The Notice was mailed just shy of three months before the scheduled hearing by both First Class and Certified Mail to the address the Respondent provided to the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d)² (the hearing notice shall be sent at least ten days before the hearing by certified mail to the business address of the licensee on record with the MHIC); *see also id.* § 8-407(a). The Notice was also mailed to his attorney of record. Despite proper notice being sent, neither the Respondent nor anyone authorized to represent him appeared for the hearing. As a result, I proceeded with the hearing in the Respondent's absence. COMAR 28.02.01.23A.

Bankruptcy Stay

The OAH file contains a letter dated January 5, 2017, from Robert M. Stahl, Esquire, Respondent's attorney, requesting that the OAH stay this claim involving the Respondent 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 Guaranty Fund claim against Respondent. 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

² Unless otherwise noted, all references hereinafter to the Business Regulation Article in the Annotated Code of Maryland are to the 2015 Replacement Volume.

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 MP. 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 16, 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 5, 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 International 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.

Merits of the Case

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); *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. 5. The Respondent performed an unworkmanlike home improvement. The Claimant's credible, un rebutted testimony and corroborating exhibits establish that the Respondent's performance of the Contract was unworkmanlike. Specifically, the resurfacing of the pool performed by Respondent began to crack and flake off less than two years after the Respondent finished work under the Contract. There is no dispute that the Respondent completed the work under the Contract in July 2012, and that the Claimant paid the Respondent the full Contract amount due, based on the Claimant's belief and understanding that the resurfacing of the pool was performed as contracted. The issue before me is whether the Respondent's work, as completed, was inadequate and/or unworkmanlike, and if so, the extent of the actual loss suffered by the Claimant.

In April 2014, fewer than three years after the Respondent completed its resurfacing of the pool, the Claimant observed cracks on the steps in the pool. The Warranty offered by the Respondent with the Contract states that the Respondent provides a three year full coverage warranty for the resurfacing job performed by the Respondent.

At the hearing, the Claimant testified that the Respondent made a temporary fix of the cracked pool steps in May 2014 and that they agreed the Respondent would permanently fix the surface of the pool the following year in April 2015. The Claimant also offered a photograph that documents that, as of March 2015, the pool's surface installed by the Respondent had significant cracks.

I do not need expert testimony to conclude the Respondent's work is inadequate and unworkmanlike. Expert testimony is not necessary in instances where the deviation from applicable industry standards is so obvious that the trier of fact can easily recognize that it violates the applicable standard. *Schultz v. Bank of America, N.A.*, 413 Md. 15, 29 (2010). The

unrebutted testimony from the Claimant with the photograph of the pool steps and surrounding pool surface documents significant cracking that even I, as a lay person, can recognize falls outside of the scope of acceptable pool construction. Additionally, the Respondent's Warranty provides for the repair of any damages to the surface of the pool for three years. This further demonstrates that it is unexpected and surprising for there to be cracks in the pool surface and creates an inference that the resurfacing of the pool was performed by the Respondent in an inadequate and unworkmanlike manner. This inference was not disproven by the Respondent.

The Claimant also produced evidence that he gave the Respondent every chance to repair the pool surface. The emails in evidence document that the Respondent was aware of the issues with the pool's surface in April and May of 2014 but never reinitiated contact with the Claimant in April of 2015 to perform its promised permanent fix of the pool's surface. In fact, in May of 2015 a representative of the Respondent spoke with the Claimant by phone and informed him that the owner of MP had passed away and that the Respondent would not perform any additional repairs to the Claimant's pool. As a result, the Claimant contracted with Wilcoxon Construction on June 18, 2015 to strip the plaster to the pool shell and re-install a Diamond Brite pool finish to the surface of the pool.

Based on the above, I find that the resurfacing of the pool by the Respondent was inadequate and unworkmanlike and, thus, the Claimant is eligible for an award from the Fund for his actual loss. Bus. Reg. §§ 8-401 and 8-405(a).

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:

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 \$8,300.00 to the Respondent, to which is added the \$10,215.00 that the Claimant paid to Wilcoxon to repair the Respondent's work, for a subtotal of \$18,515.00, from which the original contract price of \$8,300.00 (for work performed by the Respondent) must be subtracted, resulting in an actual loss of \$10,215.00.

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) and COMAR 09.08.03.03B(4). The actual loss computed above is \$10,215.00, which exceeds the amount the Claimant paid the Respondent (\$8,300.00). Accordingly, the Claimant is entitled to reimbursement from the Fund of only \$8,300.00. *Id.* § 8-405(e)(5) and COMAR 09.08.03.03B(4).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$8,300.00 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) and B (4).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$8,300.00; 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;³ and

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

Signature on File

June 7, 2017
Date Decision Issued

Brian Zlotnick
Administrative Law Judge

BMZ/emh
#168426

³ 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.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION