

<b>IN THE MATTER OF THE CLAIM</b>	<b>* BEFORE ROBERT B. LEVIN,</b>
<b>OF SHAUN AHERN,</b>	<b>* AN ADMINISTRATIVE LAW JUDGE</b>
<b>CLAIMANT</b>	<b>* OF THE MARYLAND OFFICE</b>
<b>AGAINST THE MARYLAND HOME</b>	<b>* OF ADMINISTRATIVE HEARINGS</b>
<b>IMPROVEMENT GUARANTY FUND</b>	<b>*</b>
<b>FOR THE ALLEGED ACTS OR</b>	<b>*</b>
<b>OMISSIONS OF ROBERT SPERO,</b>	<b>*</b>
<b>T/A MARYLAND POOLS, INC.,</b>	<b>* OAH No.: DLR-HIC-02-16-36227</b>
<b>RESPONDENT</b>	<b>* MHIC No.: 15 (90) 1252</b>

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**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSION OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On September 19, 2015, Shaun Ahern (Claimant), filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$18,000.00 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 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).<sup>1</sup> 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 and his attorney failed to appear, so I proceeded with the hearing in the Respondent's absence. Code of Maryland Regulations (COMAR) 28.02.01.23A.<sup>2</sup>

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 – Screenshot of text message from James E. Spero to Claimant, dated June 9, 2015

Clmt. Ex. 2 – Maryland Pools, Inc. Elevation and Excavation Approval, dated May 12, 2015

Clmt. Ex. 3a-3d – Photocopies of four photographs, undated

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<sup>1</sup> Unless otherwise noted, all references to the Business Regulation Article herein after cite the 2015 Replacement Volume.

<sup>2</sup> 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 OAH also mailed the Notice of Hearing by certified mail to the Respondent's attorney, Robert M. Stahl, Esquire. The certified mail receipt for the Notice of Hearing addressed to the Respondent 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. The certified mail receipt to Mr. Stahl was signed on January 9, 2017, by a person whose signature is illegible and the signed receipt was also received by the OAH on January 11, 2017.

- Clmt. Ex. 4 – Commercial Grade Swimming Pool Construction Agreement between Maryland Pools, Inc. and Claimant, dated April 2, 2015
- Clmt. Ex. 5 – Photocopies of Claimant’s check dated April 2, 2015, in the amount of \$3,000.00 and check dated May 12, 2015, in the amount of \$12,000.00, both made payable to Maryland Pools, Inc.
- Clmt. Ex. 6 – Rowan Landscape & Pool Company, Inc. estimate, dated April 10, 2015
- Clmt. Ex. 7 – Rowan Excavating, Inc., Invoice to Maryland Pools, Inc., dated May 12, 2015<sup>3</sup>
- Clmt. Ex. 8 – Rowan Landscape & Pools Contract with Claimant, dated June 29, 2015
- Clmt. Ex. 9 – Email from Leanne Rowan to Claimant, dated April 4, 2017

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 – Notice of Hearing, dated January 5, 2017
- Fund Ex. 2 – 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 Claimant, undated
- Fund Ex. 3 – Hearing Order, dated October 17, 2016
- Fund Ex. 4 – Home Improvement Claim Form, received by HIC on August 10, 2015
- Fund Ex. 5 – Home Improvement Claim Form, received by HIC on September 19, 2015
- Fund Ex. 6 – Letter from Joseph Tunney, Chairman, HIC, to Respondent, dated August 17, 2015
- Fund Ex. 7 – DLLR license printout for Robert Spero, dated February 2, 2017
- Fund Ex. 8 – Letter from Michael Miller to Claimant, dated July 28, 2015

Testimony

The Claimant testified on his own behalf and presented the testimony of Gloria Ahern, his wife. The Fund did not present any witness testimony.

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<sup>3</sup> At the March 30, 2017 hearing, I held the record open for one week to permit the Claimant to submit additional documents from Rowan Excavating and Rowan Pools and gave Fund counsel the opportunity to submit a written closing argument. On April 6, 2017, the Claimant submitted the three documents that I have admitted as Clmt. Exs. 7-9. Fund counsel filed a written closing argument on April 17, 2017, and I closed the record on that date.

## 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 2, 2015, 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 was \$51,000.00.
5. The Claimant paid MP a \$3,000.00 initial deposit upon signing the Contract.
6. On May 12, 2015, MP, through a subcontractor, Rowan Excavating, Inc. (Rowan Excavating), excavated the Claimant's property in preparation for the pool's installation.
7. Rowan Excavating invoiced MP \$3,407.00 for the excavation.
8. On May 12, 2015, the Claimant paid MP an additional \$15,000.00, which represented the next installment due under the Contract.
9. MP did no further work after Rowan Excavating performed the excavation.
10. On June 9, 2015, James Spero, on behalf of MP, texted the Claimant that "Sadly & unexpectedly Maryland Pool closed its doors after 66 years in business." (Clmt. Ex. 1)
11. Subsequently, MP filed for bankruptcy.

12. On June 29, 2015, the Claimant entered into a contract with Rowan Pools which provided that Rowan Pools would install the steel, stub plumbing and gunite needed for the pool and that the pool, spa and slide would be furnished at a later date by the Claimant himself. The Claimant's contract with Rowan Pools also provided that Rowan Pools would furnish Ventura Jets, a sunning shelf, the spa, two extra spa jets, the waterfall shell, waterfall pipe, plumbing for the slide and energy-saving floor returns. The total price charged by Rowan Pools under its contract with the Claimant was \$31,594.00.

13. Rowan Pools is a licensed home improvement contractor.

14. The Claimant, who undertook to finish the pool himself, is not a HIC-licensed contractor.

15. As of the date of the hearing, Rowan Pools had completed its work under its contract with the Claimant.

16. As of the date of the hearing, the pool is not finished.

17. The Claimant's actual loss is \$14,593.00.

### 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)).<sup>4</sup>

“[A]n 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”). 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. 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. 7. The Respondent performed an incomplete home improvement. The Claimant’s credible, un rebutted evidence, establish that MP failed to complete the work under the pool Contract. After MP’s Rowan Excavating, excavated the site, MP closed its doors, entered bankruptcy and did no further work on the pool project. As a result, the Claimant contracted with another Rowan entity, Rowan Pools, to complete some, but not all, of the unfinished work on the pool. The Claimant intended to complete the remainder of the project himself.

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<sup>4</sup> 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 Clmt. Ex. 4, the contract between the Claimant and MP, does not contain an arbitration clause. It may be that an arbitration clause was printed on the reverse side of a contract page but was not included in Clmt. Ex. 4 because the reverse side of the contract’s pages were not photocopied and included in Clmt. Ex. 4, or that there is some other, unexplained reason that an arbitration clause is not contained in Clmt. Ex. 4. 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.

As MP failed to complete the work required under the Contract, I find that the Claimant is eligible for compensation from the Fund.<sup>5</sup> MP agreed to install a pool on the Claimant's property for a total contract price of \$51,000.00. The Claimant paid MP an initial deposit of \$3,000.00. On May 12, 2015, Rowan Excavation, a subcontractor of MP, performed the excavation. Also on May 12, 2015, the Claimant paid MP \$15,000.00, which represented the next installment payment due. The \$15,000.00 installment payment was not earmarked for the excavation and that amount is substantially in excess of the value of the excavation, as shall be explained below. After the excavation, MP did no further work.

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<sup>5</sup> The OAH file contains a letter dated January 20, 2017, from Mr. Stahl, 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 or 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, v/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.

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).

The Claimant claims the full \$18,000.00 he paid to MP as his actual loss. While the Claimant proved by a preponderance of the evidence that he did, in fact, sustain an actual loss as a result of MP's failure to complete the work required under the Contract, I agree with Fund counsel that an award of the entire \$18,000.00 would be excessive, as it would fail to account for the value of the excavation that MP provided.

MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3)(a)-(c). Subsection B(3)(b) applies when the claimant is not seeking, or has not had, another contractor complete the contract. Subsection B(3)(c) applies when the claimant is seeking, or has had, another contractor complete the contract. Here, the Claimant and his wife testified that Rowan Excavation, acting as a subcontractor for MP, performed the original excavation and that after MP's closure, the Claimant entered into a separate contract with Rowan Pools to complete some, but not all, of the unfinished work required under the Claimant's Contract with MP.

Pursuant to the June 29, 2015 contract between the Claimant and Rowan Pools, the latter installed the steel-rebar, stub plumbing and gunite and provided ancillary items for a total cost of \$31,594.00. The Claimant undertook to complete the remaining work himself. Therefore, as Fund counsel cogently argued, this case presents the unusual situation where a homeowner has both sought another contractor to complete part of the work and also intends to complete the remainder of the job himself. Although COMAR 09.08.03.03B(3) allows for a "unique measurement" of an award if required for a particular claim, I agree with Fund counsel's analysis



and conclude that COMAR 09.08.03.03B(3)(b) should be applied here, because it is the most applicable formula and produces the most equitable result.

The formula in B(3)(c), which is designed for situations where a subsequent contractor completes the original contract, would result in what Fund counsel characterized as an "inequitable windfall" for MP. COMAR 09.08.03.03B(3)(c) takes "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."

As Fund counsel pointed out, application of this measure would involve adding the \$18,000.00 paid to MP to the \$31,594.00 paid to Rowan Pools to complete part of the project, and then subtracting the original MP contract price of \$51,000.00, resulting in an award to the Claimant of negative \$1,406.00. In other words, the Claimant would receive no award despite proving that he sustained an actual loss. The reason for this result is that no value can be assigned to the work that the Claimant chose to do himself. The subsection B(3)(c) formula is inapplicable because it is designed to compensate a homeowner by taking into account what the homeowner paid in total to obtain the *completed* home improvement (the amount paid to the original contractor plus the amount paid to the subsequent contractor to complete the original contract) compared to the original contract price. Applying subsection B(3)(c) would also produce an inequitable result because the Claimant paid \$18,000.00 to MP, an amount that substantially exceeds the value of the excavation, the only service that MP ever provided the Claimant.

The more directly applicable and the fairest formula for this case is subsection B(3)(b), which takes "the amount which the claimant paid to the original contractor less the value of any

materials or services provided by the contractor.” Application of this formula would allow the Claimant to recover the money he paid MP for which no services or materials were provided, while accounting for the value of the excavation that MP provided before it ceased work.

The Claimant’s evidence established that he paid MP \$18,000.00 and that Rowan Excavating invoiced MP \$3,407.00 for the excavation. I agree with Fund counsel that the Rowan Excavating invoice to MP for the excavation (Clmt. Ex. 7) represents the reasonable value of the excavation that MP provided, through its subcontractor Rowan Excavating, to the Claimant. Although the Claimant and his wife testified that Rowan Pools had to touch up the excavation, due to the effect of spring rain before Rowan Pools began working on the pool in June 2015, the evidence does not show that Rowan Pools charged the Claimant for redoing any excavation work. Indeed, the June 29, 2015 contract between Rowan Pools and the Claimant provides that there would be “[n]o additional cost to buyer resulting from rain damage to pool during construction.” (Clmt. Ex. 8, p. 2)

Thus, the Claimant did receive value from the excavation provided by MP. That value is reasonably quantified as \$3,407.00, the amount of Rowan Excavating’s invoice to MP for the original excavation work. (Clmt. Ex. 7) Subtracting the \$3,407.00 value of the excavation from the \$18,000.00 the Claimant paid MP leaves \$14,593.00, which I conclude represents the amount paid by the Claimant to MP for which the Claimant received zero value, *i.e.* no services or materials. Therefore, Fund recommends, and I agree, that the Claimant’s actual loss, and the amount of the award that I recommend, is \$14,593.00.

**PROPOSED CONCLUSION OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$14,593.00 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)(b).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$14,593.00; 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;<sup>6</sup> and

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

**Signature on File**

June 2, 2017  
Date Decision Issued

Robert B. Levin  
Administrative Law Judge

RBL/emh  
#168299

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

**PROPOSED ORDER**

***WHEREFORE, this 10<sup>th</sup> 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**