

IN THE MATTER OF THE CLAIM	* BEFORE RACHAEL BARNETT,
OF MARK & LISA MALECKI <sup>1</sup> ,	* 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 JAMES LANDOT,	*
T/A VISTA PRO LANDCAPE &	* OAH No.: LABOR-HIC-02-24-07750
DESIGN, INC.,	* MHIC No.: 24 (75) 388
RESPONDENT	*

\* \* \* \* \*

### **PROPOSED DECISION**

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

### **STATEMENT OF THE CASE**

On January 11, 2024, Steve and Lisa Malecki (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)<sup>2</sup> Guaranty Fund (Fund) for reimbursement of \$17,000.00 for actual losses allegedly suffered as a result of a home improvement contract with James Landot, trading as Vista Pro Landscape & Design, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2024).<sup>3</sup> On March 18, 2024, the MHIC issued a Hearing

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<sup>1</sup> Mr. Mark Steven Malecki is more commonly known as Steve Malecki.

<sup>2</sup> The MHIC is under the jurisdiction of the Department of Labor (Department).

<sup>3</sup> Unless otherwise noted, all references to the Business Regulation Article are to the 2024 Volume of the Maryland Annotated Code.

Order on the Claim and forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On October 10, 2024, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Hope Sachs, Assistant Attorney General, Department, represented the Fund. Shawn Haught, Jr., Esquire, represented the Claimants, who were present. The Respondent was self-represented.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2024); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

### **ISSUES**

1. Did the Claimants 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 offered by the Claimants:

- |                   |   |
|-------------------|---|
| Clmt. Ex. 1 -     | Pool and Concrete Pool Deck Installation Contract, November 2, 2020               |
| Clmt. Ex. 2 -     | Balance Sheet for Completed Work, September 9, 2021                               |
| Clmt. Ex. 3A - 3L | Photographs of Pool Area, undated   |
| Clmt. Ex. 4 -     | Estimate from Amazing Construction, LLC, undated                                  |
| Clmt. Ex. 5 -     | Estimate from Maryland Decking, August 13, 2024                                   |
| Clmt. Ex. 6 -     | Department of Labor Results for Active Licensed Home Improvement, October 9, 2024 |

I admitted the following exhibits offered by the Respondent:

- Resp. Ex. 2<sup>4</sup> - Pool Plan, October 31, 2020
- Resp. Ex. 3 - Diagram of Outdoor Space, undated
- Resp. Ex. 4 - ARDEX CD Product Information, November 2014

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Hearing, June 26, 2024
- Fund Ex. 2 - Letter from DLR to the Respondent, January 11, 2024
- Fund Ex. 3 - Certification of Custodian of Records or Other Qualified Individual, May, 2023

Testimony

Both Claimants testified and did not present other witnesses.

The Respondent testified and did not present other witnesses.

The Fund did not present the testimony of any witnesses.

**PROPOSED FINDINGS OF FACT**

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

1. The Claimants own their home, located in Millersville, Maryland. They reside there together. It was a new construction home at the time of purchase in 2019, and the Claimants decided to add a backyard pool.
2. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license numbers 01-86097 and 05-127263.
3. On November 2, 2020, the Claimants and the Respondent entered a contract to install an eighteen by thirty-six-foot concrete pool. The job also included site grading and soil

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<sup>4</sup> Respondent Exhibit 1 was not admitted because it was a duplicate of a previously admitted document. Respondent Exhibit #5 was also not admitted.

removal, installing pool equipment and lights, and installing an 810 square foot concrete pool deck with fine broom finish, and one seven-inch step. (Contract).

4. The original agreed-upon Contract price was \$60,609.00.

5. The Contract specified that the cost of the concrete pool deck was \$9,656.00.

6. The Contract stated that work would begin within fourteen days of securing county permits (weather permitting) and would be completed in May 2021. There was a slight delay; work started in May 2021 and finished in September 2021.

7. The Claimants and the Respondent agreed to one or more change orders at an additional cost.

8. On November 23, 2020, the Claimants paid the Respondent a deposit of \$10,861.00.

9. Between June 11, 2021 and August 23, 2021, the Claimants paid a total of \$63,154.00. After this point, the work called for under the Contract was complete.

10. Shortly after the work was completed, the Claimants noticed inconsistent coloration and cracks in the concrete patio, as well as water pooling (and not draining) on the pool deck.

11. The Claimants contacted the Contractor and informed him of their concerns regarding the pool deck.

12. The Contractor initially tried to resolve the concerns, returning to the worksite for adjustments on multiple occasions.

13. One of the adjustments involved drilling a hole in the concrete and creating channel around the steps to allow water to drain. This temporarily resolved the issue of pooling water; however, it reoccurred.

14. The Respondent also applied stain to the deck to hide the differences in coloration; however, the stain did not resolve the coloration issue and was easily scratched and scuffed.

15. The Respondent power washed the deck, but this did not resolve the coloration issues, either.

16. The Respondent also offered to provide a skim coating for the pool deck and did a sample patch of ARDEX, which the Claimants were not pleased with because it still showed multiple colors. The Respondent did not have experience with the application of ARDEX.

17. The Claimants continued to send text messages to Mr. Landot (their contact for the Respondent); however, in July 2023 Mr. Landot stopped responding.

18. In the summer of 2023, the Respondent's business was collapsing, and while the Respondent considered hiring an experienced company to apply a skim coating, he did not pursue this option due the strains of his failing business.

19. The Respondent has since gone out of business.

20. On a date unknown, Amazing Construction, LLC provided an estimate of \$17,000.00 to replace the pool deck; however, this estimate included work that was outside the scope of the original Contract.

21. On July 30, 2024, Maryland Decking provided an estimate of \$29,410.40 to replace the pool deck; however, the estimate also included work that was outside the scope of the original Contract.

### **DISCUSSION**

The Claimants have the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov't § 10-217 (2021); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is

“more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for 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 Claimants have proven eligibility for compensation.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimants’ recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimants did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2024). The Claimants reside in the home that is the subject of the claim or does not own more than three dwellings. *Id.* § 8-405(f)(2) (2024). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2024). The Claimants are not relatives, employees, officers, or partners of the Respondent, nor are they related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (2024).

The Claimants did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (2024). The Claimants only concern was with the pool deck. They raised their concerns with Mr. Landot, and he made several efforts to correct the problems with drainage, cracks, and coloration. His final attempt was to have his employees (who were not experienced doing so) do a test patch application with a skimming product, called ARDEX. The manufacturer’s information about this product is in evidence as Respondent’s Exhibit 4.

The images of the product in the exhibit show a thick grey coating product being applied with a metal blade over another surface and then being broom swept to an even consistency.

Mr. Landot testified with surprising candor that his employees did not have experience with this product, so he offered a test patch, which he acknowledged was not satisfactory. He further testified that since his business was collapsing at that time, he considered offering to have another business professionally install the ARDEX coating but never finalized this arrangement or communicated this offer to the Claimants because of the strain of running a failing business. Furthermore, the Respondent did not dispute that the condition of the pool deck was unworkmanlike and required additional work to correct. The Respondent only argued that the cracks in the concrete were not structurally problematic, but rather suggested they were visually displeasing hairline cracks. He did not dispute that water pooled on the deck and described his efforts to try to correct it.

Regarding the Contract, it was clearly broken down to specify the cost of the pool, the saltwater generator, and the concrete pool deck (for \$9,656.00). The Claimants ultimately paid slightly more than the original estimate, which Mr. Malecki explained was due to change orders. However, the Claimants did not offer into evidence any documentation of the change orders, so it is impossible to know whether these additional costs should be attributed to the pool deck or another part of the job. Therefore, I will consider the cost of the pool deck to be based on the original contract term, \$9,656.00.

Based on the testimony of the Claimants and the Respondent, as well as on the pictures in evidence, it is clear that the pool deck was constructed in an unworkmanlike manner. The colors of the decking range from brown to grey and includes an amount of color striping that is atypical for pool decks. Furthermore, Claimants' Exhibit 3k shows a significant pool of water along the edge of the pool deck, which suggests that the construction did not provide sufficient grading or

drains for runoff. Both the estimates in evidence call for the removal and replacement of the pool decking. The Respondent performed unworkmanlike home improvements. I thus find that the Claimants are eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimants' actual loss and the amount, if any, that the Claimants are entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3) (2024); 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.

However, none of the following three regulatory formulas is appropriate in this case:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) 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)(a)-(c). Accordingly, I shall apply a unique formula to measure the Claimants' actual loss. While the Claimants are soliciting other contractors to perform the work, both estimates contain work recommendations that are beyond the scope of the original Contract. Furthermore, it is the nature of concrete that it is a very solid material and therefore, hard to change without removing it completely. Since part of the work needed is to provide for



sufficient drainage, simply resurfacing the concrete would not resolve all the unworkmanlike features of its installation. Rather, I agree with the two contractors that wrote estimates that the concrete must be removed and then replaced. For this reason, I find that the pool deck has no value in its current state and will award the Claimants the \$9,656.00 that they paid for it under the Contract.

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.<sup>5</sup> Bus. Reg. § 8-405(e)(1), (5) (2024); COMAR 09.08.03.03B(4). In this case, the Claimants' actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimants are entitled to recover their actual loss of \$9,656.00.

#### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimants have sustained an actual and compensable loss of \$9,656.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2024); COMAR 09.08.03.03B(3)(a)-(c). I further conclude that the Claimants are entitled to recover that amount from the Fund. Bus. Reg. § 8-405(e)(1), (5) (2024); COMAR 09.08.03.03B(4).

#### **RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimants \$9,656.00; and

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<sup>5</sup> On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. See *Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

**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.

January 7, 2025  
Date Decision Issued

*Rachael Barnett*  
Rachael Barnett  
Administrative Law Judge

RAB/at  
#215781

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<sup>6</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2024); COMAR 09.08.01.20.

**PROPOSED ORDER**

***WHEREFORE, this 20<sup>th</sup> day of May, 2025, 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.***

**Michael Thomas**

**Michael Thomas**

**Panel B**

**MARYLAND HOME IMPROVEMENT  
COMMISSION**