

IN THE MATTER OF THE CLAIM	* BEFORE BRIAN ZLOTNICK,
OF CECILIA SMITH,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH No.: DLR-HIC-02-16-36054
FOR THE ALLEGED ACTS OR	* MHIC No.: 15 (90) 1247
OMISSIONS OF ROBERT SPERO, T/A	*
MARYLAND POOLS INC.,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION¹

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STATEMENT OF THE CASE

On September 3, 2015, Cecilia Smith (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of

¹ The Code of Maryland Regulations (COMAR) 09.08.02.01B provides that “[a]ll contested case hearings delegated to the Office of Administrative Hearings shall be governed by COMAR 09.01.03.” COMAR 09.01.03.08 states:

A. Upon completion of the hearing, the ALJ shall submit a proposed decision to the administrative unit.

....

C. The proposed decision shall comply with the requirements of the Administrative Procedure Act and COMAR 28.02.01.22, and shall include:

- (1) Written findings of fact;
- (2) Proposed conclusions of law; and
- (3) A recommended order.

\$18,492.00 in alleged actual losses suffered as a result of a home improvement contract with Robert Spero (Respondent), trading as Maryland Pools Inc. (MP).

I held a hearing on March 16, 2017, at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).² The Claimant appeared and represented herself. The Respondent and his attorney of record, Robert M. Stahl, Esquire, did not appear for the hearing. John D. Hart, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), appeared as counsel to the Fund.

The contested case provisions of the Administrative Procedure Act, the MHIC procedural 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. 2016); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01B, and 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 MP'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?

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 Notice of Hearing, dated December 29, 2016
- GF Ex. 2 Notice of Hearing, dated December 29, 2016 with attached certified mail receipts
- GF Ex. 3 Hearing Order, dated October 18, 2016
- GF Ex. 4 MHIC Licensing Information for the Respondent and MP, showing licensing status that was valid from October 29, 2007 to October 29, 2015
- GF Ex. 5 Home Improvement Claim Form, dated September 3, 2015
- GF Ex. 6 Letter from DLLR to the Respondent, dated September 8, 2015
- GF Ex. 7 Letter from DLLR to the Claimant, dated July 28, 2015

I admitted the following exhibits on behalf of the Claimant:

- Cl. Ex. 1 Contract between Claimant and MP, with Payment Schedule, dated January 18, 2015
- Cl. Ex. 2 Cancelled check from Claimant to MP for \$2,000.00, dated January 18, 2015
- Cl. Ex. 3 Cancelled check from Claimant to MP for \$26,805.00, dated February 8, 2015
- Cl. Ex. 4 Cancelled check from Claimant to MP for \$36,857.00, dated March 4, 2015
- Cl. Ex. 5 Contract between Claimant and Arcadia Pools, dated June 14, 2015
- Cl. Ex. 6 Specifications of contract with Arcadia Pools, undated

No exhibits were offered by the Respondent.

Testimony

The Claimant testified on her own behalf and presented her daughter, Pixie-Ann Allan as a witness.

The Respondent was not present to testify or present witnesses.

The Fund did not present any witnesses.

FINDINGS OF FACT

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

1. At all times relevant to the subject matter of this hearing, the Respondent, who traded as MP, was licensed as a home improvement contractor with the MHIC.
2. The Respondent provided the MHIC with the address of 18 Trojan Horse Drive, Phoenix, Maryland 21131 (MHIC Address) as his address.
3. On or about January 18, 2015, the Claimant and MP entered into a contract for the installation of a swimming pool (Contract). The Contract price for the pool was \$69,013.00. The balance of the Contract, \$74,544.00, was for utility work performed by subcontractors not affiliated with MP.
4. The Claimant paid MP \$65,662.00 as follows:
 - \$2,000.00 on January 18, 2015 (Check #130)
 - \$26,805.00 on February 8, 2015 (Check #221)
 - \$36,857.00 on March 4, 2015 (Check #251)
5. On March 4, 2015, MP installed the pool shell into the excavated land. From March 4, 2015 to May 4, 2015, no further work was performed by MP.
6. Between March 4, 2015 and May 4, 2015 the Claimant and her daughter, Ms. Allan, made numerous phone calls and emails to MP inquiring as to when MP would complete the Contract. The Claimant and Ms. Allan did not receive any response to their calls and emails.

7. The Claimant called MP on May 4, 2015 and spoke to Julie, a representative of MP, who informed the Claimant that she would investigate the delay in the completion of the Contract.

8. On May 6, 2015, the Claimant spoke to Julie who informed the Claimant that the office was in disarray because the owner of MP, Robert Landon, had passed away.

9. From May 6, 2015 to May 17, 2015, the Claimant made repeated phone calls to MP inquiring when they would finish installing the pool, but those calls were not returned. On May 17, 2015, Mr. Sipes, a salesperson for MP, notified the Claimant by phone that MP had declared bankruptcy and that the business had been vacated.

10. On June 14, 2015, the Claimant hired Arcadia Pools, MHIC license #109313, to complete the Contract work for \$18,492.00. Arcadia Pools specified that it would perform the following tasks to complete the Contract:

- Install fittings, skimmer, canister, bottom and side drain
- All final plumbing and connections to equipment
- Installation of clean and clear Pentair Filter
- Heat Pump
- Diamond Brite Plaster interior finish
- Beginning and opening chemicals

11. All of the work completed by Arcadia Pools was the same as required by the original Contract.

12. On or about July 6, 2015, MP filed a voluntary bankruptcy petition with the United States Bankruptcy Court in Baltimore, Maryland.

13. On September 3, 2015, the Claimant filed the Claim with the MHIC.

14. On September 8, 2015, the Fund notified the Respondent and his attorney that the Claim had been filed against him by the Claimant.

15. On October 18, 2016, the MHIC issued a Hearing Order stating that it was referring the Claim to the OAH for a hearing.

16. On December 29, 2016, the OAH mailed a Notice of Hearing (Notice) by United States Postal Service (USPS) Certified Mail Return Receipt and by First Class Mail to the Respondent's MHIC Address and to the Respondent's attorney of record, Mr. Stahl. This Notice advised the Respondent that a hearing was scheduled for March 16, 2017, at 9:30 a.m., at the OAH in Hunt Valley, Maryland.

17. The Certified Mail Return Receipt for the Notice mailed to the Respondent's MHIC Address was signed as received by Patti Spero. The Certified Mail Return Receipt for the Notice mailed to Mr. Stahl was signed as received N. Lyons. The First Class Mail Notices were not returned to the OAH by the USPS.

18. On January 5, 2017, Mr. Stahl wrote a letter to the OAH requesting that the OAH stay this case because MP had filed a voluntary bankruptcy petition.

19. No party made a request to postpone the March 16, 2017 hearing.

20. The Contract contains an arbitration clause. As of the date of the hearing, the Respondent had not advised the Claimant, the MHIC or the OAH that he intends to participate in arbitration of the issues underlying this Claim.

21. Besides the January 5, 2017 letter from Mr. Stahl, neither the Respondent, nor anyone authorized to represent him, initiated any contact with the Claimant, the MHIC or the OAH after the filing of this Claim.

22. The Claimant is not: a spouse or other immediate relative of the Respondent; an employee, officer, or partner of the Respondent; or an immediate relative of an employee, officer, or partner of the Respondent.

23. The Claimant has not taken any action to recover monies for the Respondent's or MP's failure to complete the Contract work, other than the instant Claim.

24. The property where the Contract work was performed is the only residential property the Claimant owns in Maryland and it is her primary residence.

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 to the Respondent to his MHIC Address of record and to his attorney, Mr. Stahl, via both First Class and Certified Mail. The Certified Mail Notices were signed as received by someone at both the Respondent's and Mr. Stahl's addresses. The First Class Mail Notices were not returned to the OAH by the USPS.

On March 16, 2017, at 9:30 a.m., I convened a hearing in this case at the OAH. By 10:00 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) (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, the Respondent failed to appear 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 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 to stay.

Under 11 U.S.C.A.³ § 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

³ "U.S.C.A." stands for "United States Code Annotated."

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 Claim

A claimant bears the burden of proof, by a preponderance of the evidence, that it is entitled to an award from the Fund. Md. Code Ann., Bus. Reg. § 8-407(e)(1); COMAR 09.08.03.03A(3); Md. Code Ann., State Gov't § 10-217 (2014). 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); *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."). 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, COMAR 09.08.03.03B(1), and may not compensate a claimant for more than was paid to the original contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(5).⁴

Arbitration Clause

The Contract between the Claimant and MP contains an arbitration clause, which states, in pertinent part, as follows:

Any controversy, action, claim, dispute, breach or questions 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.

...
Under Business Regulation Article SS8-405(C) [sic], 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.

See Cl. Ex. 1, Section 9.

⁴ A claimant must also prove that at all relevant times: (a) the owner owned fewer than three dwelling places or resides in the home as to which the claim is made; (b) the owner was 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 owner did not unreasonably reject the contractor’s good faith effort to resolve the claim; (e) there is no pending claim for the same loss in any court of competent jurisdiction and the owner did not recover for the actual loss from any source; and (f) the owner filed the claim with the MHIC within three years of the date the owner knew or with reasonable diligence should have known of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(d), (f), and (g), 8-408(b)(1); *id.* § 8-101(g)(3)(i) (Supp. 2016).

The Claimant provided uncontroverted evidence that she meets all of the above-enumerated requirements, and the Fund did not challenge any of the Claimant’s evidence.

Section 8-405(c) requires that the Claimant prove that she complied with any contract arbitration clause before seeking compensation from the Fund. Md. Code Ann., Bus. Reg. § 8-405(c). Additionally, COMAR 09.08.03.02E provides:

E. Compulsory Binding Arbitration. When a contract between a claimant and a contractor requires that all contract disputes be submitted to binding arbitration, the claimant shall either:

- (1) Submit their dispute to binding arbitration as required by the contract;
or
- (2) Provide evidence to the Commission 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. The Commission shall then give the contractor written notice that, if the contractor does not agree to binding arbitration, the Commission will consider the compulsory arbitration clause to be void and process the claimant's claim pursuant to this chapter.

COMAR 09.08.03.02E.

At the hearing, Mr. Hart, the Assistant Attorney General representing the Fund, stated that the MHIC is aware that the Contract contains this arbitration clause, and proffered that it is the MHIC's position that the Respondent waived his contractual right to compel arbitration and that the Claim may properly be considered at this time.⁵

Section 8-405(c) of the Business Regulation Article protects the Fund from being depleted and ensures its continued solvency for the payment of future claims. Section 8-410 provides that once the MHIC pays a claim, the MHIC is subrogated to all rights of the claimant, and the MHIC may sue the contractor for the amount paid by the Fund on the claim. Md. Code Ann., Bus. Reg. § 8-410(a) and (b). This subrogation right allows the Fund to collect from the offending contractor what it has paid to a claimant, thus replenishing the Fund so that it

⁵ The Contract was not executed by the Respondent; but rather, it was executed by a salesman on behalf of MP. However, as discussed in the Court of Special Appeals in *Case Handyman & Remodeling Services, LLC v. Schuele*, the principles of equitable estoppel mandate that the Respondent may compel arbitration. 183 Md. App. 44, 62 (2008) (“[A] non-signatory of an applicable arbitration contract can enforce an arbitration clause under the doctrine of equitable estoppel when the signatory’s claims against the non-signatory rely on the written agreement.” (footnote omitted)), *vacated on other grounds*, 412 Md. 555 (2010).

continues to have sufficient resources to make payments on future awards.⁶ However, when the MHIC initiates a lawsuit against a contractor, the MHIC steps into the shoes of the claimant, and the contractor may assert any defenses against the MHIC that it would have had against the claimant, including the claimant's failure to bring the dispute to arbitration. *See Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 313 (2007) (the substituted person "can exercise no right not possessed by his predecessor, and can only exercise such right under the same conditions and limitations as were binding on his predecessor.") (quoting *Poe v. Phila. Cas. Co.*, 118 Md. 347, 353 (1912)). Accordingly, to ensure the continued solvency of the Fund through subrogation actions against contractors, section 8-405(c) limits the MHIC's ability to pay an award from the Fund when a claimant has not complied with a contract arbitration clause.

There are times, however, when a contract at issue in a claim contains an arbitration clause, but a claimant is unable to engage the contractor in arbitration. Clearly, the purpose of the Fund is to compensate homeowners for actual losses incurred at the hands of a licensed contractor, and this dictates that a claimant, who is barred from complying with a contract arbitration clause due to the actions of a contractor, should nevertheless be permitted to seek recovery from the Fund.

Maryland courts recognize that the right to arbitrate is a right created by contract, and that a party to that contract may waive its right to arbitrate. 2 Maryland Law Encyclopedia, *Alternative Dispute Resolution* § 23 (Westlaw 2017); see also *Brendsel v. Winchester Const. Co., Inc.*, 162 Md. App. 558, 573, *cert. granted*, 389 Md. 124 (2005), *aff'd*, 392 Md. 601 (2006).

Usually, a court will only determine that a party waived its right when it does so through

⁶ The MHIC has been tasked with the establishment and administration of the Fund. *See* Md. Code Ann., Bus. Reg. § 8-403(a) and (c). The Fund is supported by initial fees and assessments from licensed contractors and from reimbursements the MHIC collects from the contractors who give rise to claims. *Id.* §§ 8-404, 8-410. If the Fund does not have sufficient money to cover an award, the claimant must wait until there is enough money to pay the claim. *Id.* § 8-409(c). Thus, the MHIC has a policy interest in preserving the Fund so that it is available for all claimants.

unequivocal acts or language. *Brendsel*, 162 Md. App. at 574. However, it is possible for waiver to be established when a party delays in demanding arbitration. *Id.* at 573; *see also Redemptorists v. Coulthard Servs., Inc.*, 145 Md. App. 116, 141 (2002). COMAR 09.08.03.02E is a mechanism for the Fund to establish that a contractor waived arbitration with a claimant. If the MHIC follows the procedures contained in COMAR 09.08.03.02E, it creates a factual record that may be used in any future subrogation lawsuit against defense of “failure to arbitrate” asserted by the contractor.

Clearly, however, if the facts of a particular case already are sufficient to prove waiver of the arbitration clause by the contractor, it is unnecessary for the MHIC to follow the provisions of COMAR 09.08.03.02E. In this case, there is abundant evidence to support the MHIC’s position that the Respondent’s action in this case, or more accurately his inaction, amounts to a waiver of his right to arbitrate, and therefore, it was unnecessary for the MHIC to require that it and the Claimant strictly adhere to the procedures outlined in COMAR 09.08.03.02E. The Respondent has known that the Claim was pending before the Fund for the seventeen months prior to this hearing. *See* GF Ex. 6 (September 8, 2015 letter to the Respondent advising him that this Claim was pending against the Fund). Additionally, the Respondent was reminded of the pendency of this Claim through the December 29, 2016 Notice of Hearing. *See* GF Ex. 2. Despite this repeated actual notice, the Respondent never attempted to compel arbitration either through the Claimant, the MHIC, or the OAH. Mr. Hart proffered that the Respondent never contacted the MHIC to demand that the matter be submitted to arbitration, and the OAH case file does not include any correspondence from the Respondent addressing arbitration. Most interestingly, on January 5, 2017, Mr. Stahl contacted the OAH on behalf of the Respondent and MP, and requested that the hearing on the Claim be stayed pending MP’s voluntary bankruptcy petition; however, Mr. Stahl’s letter was silent regarding arbitration. *See* OAH Case File, docket

entry 3. Finally, the Respondent did not avail himself of his right to attend the hearing on the Claim and to object to the hearing of the matter prior to arbitration.

Based on these facts, I conclude that the Respondent waived his right to arbitrate this Claim, and that it was appropriate for the MHIC to forward this Claim for a merits hearing, despite the presence of an arbitration clause in the Contract.⁷

Actual Loss and Amount of Award

The uncontroverted evidence is that the Respondent abandoned the Contract after performing only some of the Contract work and therefore left the Claimant with an incomplete home improvement. The Respondent began installing the pool at the Claimant's primary residence in January 2015 and ceased working on the Contract on March 4, 2015. At that time, only the pool shell was installed leaving the following items left to complete under the Contract:

- Fittings, skimmer, canister, bottom and side drain
- All final plumbing and connections to equipment
- Installation of clean and clear Pentair Filter
- Heat Pump
- Diamond Brite Plaster interior finish
- Beginning and opening chemicals

By March 2015, the Claimant had paid the Respondent \$65,662.00 towards the \$69,013.00 Contract price.

Between March and May 2015, the Claimant and her daughter made numerous telephone calls and emails to MP to discuss when it intended to complete the Contract work. In May 2015, an employee of MP informed the Claimant that she would look into the delay in completing the Contract. During the second week of May 2015, Mr. Sipes, Salesperson for MP, informed the

⁷ Although, for purposes of whether an award should be made to the Claimant from the Fund, I conclude that the Respondent waived his right to arbitrate; the court that presides over the subrogation case will render its own determination on that issue.

Claimant that MP had gone into bankruptcy and that the business had been vacated. The Claimant never heard from the Respondent or MP again.

The Claimant suffered an actual loss when the Claimant had to pay money to another licensed contractor to complete the Contract work. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a). The Claimant hired and paid Arcadia Pools \$18,492.00 to complete the Contract. There is no doubt that the amount the Claimant paid Arcadia Pools was reasonable as Arcadia Pools listed the items that needed to be completed and those items included plumbing, final plaster installation, installation of filters, skimmers, heat pump, mineral spring salt generator, and beginning and opening chemicals. I therefore find that the \$18,492.00 charged by Arcadia Pools was reasonable.

COMAR 09.08.03.03B(3)(c) provides the following formula as an appropriate measure of 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.

Paid to MP	\$65,662.00
<u>Paid to Arcadia Pools</u>	<u>+\$18,492.00</u>
Total Paid	\$84,154.00
<u>Minus Contract Price</u>	<u>-\$69,013.00</u>
Actual Loss	\$15,141.00

Pursuant to the 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. Bus.

Reg. § 8-405(e)(1), (5). The Claimant's actual loss of \$15,141.00 is not limited by this provision of law.

During the hearing, the Assistant Attorney General stated that this case is only one of many against the Respondent and MP. 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 \$15,141.00 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 \$15,141.00, 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 \$15,141.00, unless otherwise limited by section 8-405(e)(2) of the Business Regulation Article; 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 at least ten percent (10%) as set by the Maryland Home Improvement Commission;⁸ and

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

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/sm
#168467

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