

**IN THE MATTER OF THE CLAIM
OF JASON LOUGHERY,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF ROBERT SPERO,
T/A MARYLAND POOLS, INC.,
RESPONDENT**

*** BEFORE JENNIFER A. NAPPIER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-17-08808
* MHIC No.: 15 (05) 1270
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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 October 12, 2016, Jason Loughery (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC or Commission) Guaranty Fund (Fund) for reimbursement of \$20,070.38 in alleged actual losses suffered as a result of a home improvement contract with Maryland Pools, Inc., (Respondent or Maryland Pools).¹ After an investigation, the Commission issued a Hearing Order on March 17, 2017 and forwarded the case to the Office of Administrative Hearings (OAH).

¹ The holder of the Respondent's MHIC license is Robert Spero. Therefore, the case name reflects Robert Spero, t/a Maryland Pools, Inc., as the Respondent.

I held a hearing on June 26, 2017 at the Department of Natural Resources in Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Neither the Respondent, nor his attorney, appeared for the hearing. After waiting over fifteen minutes for the Respondent or someone representing him to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 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:

- CL Ex. 1 Maryland Pools Contract, February 6, 2015
- CL Ex. 2 Cash Payment Schedule, undated; copies of checks, December 19, 2014, February 6, 2015, March 19, 2015 and March 31, 2015
- CL Ex 3 Photos of unfinished pool, late-May 2015
- CL Ex. 4 Maryland Pools Contract Addendum, April 14, 2015
- CL Ex. 5 Email chain between Jon Coakley to Claimant, May 2015

- CL Ex. 6 Terra Nova Construction Invoice, July 21, 2015; Hachick invoices, July 16, 2015
- CL Ex. 7 Letter of Intent, December 19, 2014
- CL Ex. 8 Email from Jon Coakley to Claimant, May 4, 2015

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 Hearing Order, March 17, 2017
- GF Ex. 2 Notice of Hearing, April 17, 2017
- GF Ex. 3 Letter from Robert Stahl to MHIC, July 6, 2015
- GF Ex. 4 Home Improvement Claim Form, September 17, 2016
- GF Ex. 5 MHIC Licensing Information for the Respondent, printed February 14, 2017

No exhibits were offered on the Respondent's behalf.

Testimony

The Claimant testified on his own behalf and presented the testimony of Jon Coakley and Lori Clough.

The Fund did not present any witnesses.

No one appeared to testify on behalf of the Respondent.

PROPOSED FINDINGS OF FACT

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

1. At all relevant times, the Respondent was a licensed home improvement contractor under MHIC license numbers 01-93100 and 05-6694.
2. At all relevant times, the Claimant was the owner of a home located on Carnoustie Drive in Pasadena, Maryland, which is his personal residence. The Claimant owns no other residences in Maryland.

3. Neither the Claimant, nor his wife, is an employee, officer or partner of the Respondent, or related to any of the Respondent's employees, officers or partners.

4. Robert Spero holds the Respondent's MHIC license.

5. On December 19, 2014, the Claimant signed a letter stating his intent to enter into a Contract with the Respondent to design and furnish plans and specifications for the construction of a pool at his residence. The Letter of Intent provided that the Claimant would pay \$500.00 for preparation of the pool plans and specifications. The Letter of Intent further stated that upon execution of a contract, the \$500.00 payment would be deducted from the price of the pool.

6. On February 6, 2015, the Claimant and the Respondent entered into a contract for construction of a custom swimming pool (Contract) at the Claimant's residence. The pool was to be twenty-six feet and nine inches in width and thirty-nine feet in length, with a water depth ranging from three feet to eight feet. The Contract also included the following equipment:

- One loveseat
- Two underwater LED lights
- Automatic pool cleaner
- 400 BTU natural gas heater
- Automatic pool/spa controls
- Automatic pool cover
- Pool raised beam with cultured stone face
- Umbrella sockets in a shallow bench

7. The original agreed-upon contract price for the pool was \$45,745.00.²

8. The Contract required the Claimant to pay a \$2,000.00 deposit at the time of the Contract. The Contract provided for the following cash payment schedule for the balance of the Contract price:

- \$17,498.00 due at the time of excavation
- \$24,060.00 due upon completion of the concrete shell
- \$2,187.00 due at the time of application of the plaster

9. The Contract did not contain a specific start or completion date. However, the Contract contained the following language: “[the Respondent] shall apply for a building permit within 7 working days from the date of this contract. If contract requires financing, the building permit will be applied for within 7 working days after notification of approval of financing. Construction shall be scheduled approximately 7 working days after permit has been obtained and shall be substantially completed approximately 35 working days after completion of excavation, weather permitting.”

10. The Claimant paid the Respondent \$43,558.00 as follows:³

- \$500.00 on December 19, 2014 (check #3706)
- \$1,500.00 on February 6, 2015 (check #3739)
- \$17,498.00 on March 19, 2015 (check #3763)
- \$24,060.00 on March 31, 2015 (check #3769)

11. The Respondent began to perform work under the Contract on or about March 19, 2015.

² The Contract also included an additional cost of \$5,615.00 for utilities and appurtenances to be paid directly to the subcontractors responsible for completing that work.

³ The checks were written by the Claimant's wife, Lori Clough.

12. On April 14, 2015, the Claimant and Respondent amended the Contract to exclude the coping work, including the cultured stone and labor associated with its installation, decreasing the total contract price by \$2,320.00.

13. In early May 2015, the Claimant began to consider having an electric heat pump installed for the pool, instead of the gas heater provided for in the Contract. On May 1, 2015, he sent his Maryland Pools sales person, Jon Coakley, an email requesting information on an electric heat pump.

14. On May 4, 2015, Mr. Coakley responded to the Claimant's May 1st email, stating that the gas heater would cost \$2,700.00 and installation of an electric heat pump would cost \$4,850.00.

15. The Claimant and Respondent never modified the Contract to include an electric heat pump instead of the gas heater.

16. The Respondent last performed work under the Contract on or about May 7, 2015. By that time, the Respondent had completed excavation and applied the concrete pool shell. However, the plumbing work was not completed, none of the equipment had been installed or delivered to the Claimant, and the plaster had not been applied to the pool.

17. The Claimant contacted Mr. Coakley around late-May 2017. At that time, Mr. Coakley informed the Claimant that he was no longer employed by the Respondent and that the Claimant would need to contact the Respondent directly.

18. In late-May 2017, the Claimant visited the Respondent's office in Columbia, Maryland. The Claimant met with Mr. Spero and Bob Brucksch,⁴ who informed the licensee that the Respondent's President had recently committed suicide and that they could not finish the

⁴ The record is silent as to Mr. Brucksch's position with Maryland Pools.

Claimant's pool because they were unable to locate the company's funds. Mr. Spero and Mr. Brucksch further informed the Claimant that the Respondent had not yet ordered any of the equipment the Claimant had already paid for.

19. Mr. Spero and Mr. Brucksch stated that they could complete the pool if the Claimant paid for the equipment again, at a cost of approximately \$12,000.00. The men offered to pay the Claimant back for the equipment, a year or so later, once the Respondent was making enough money. The Claimant rejected this offer.

20. The Respondent closed its business two days after the Claimant's visit to the Respondent's office.

21. In July 2015, the Claimant contracted with Terra Nova Design Build (Terra Nova) to perform the work left incomplete by the Respondent, including plumbing, installation of the pool equipment, and application of the plaster, as provided for in the Contract with the Respondent.

22. The work performed by Terra Nova was within the original scope of the Maryland Pools Contract, with two exceptions—the Claimant elected to have an electric heat pump installed and to upgrade from a fiberglass pool pad to a concrete pool pad.

23. Terra Nova purchased the pool equipment from Hachik for the sum of \$10,650.82. Hachik is the same company from which the Respondent was to purchase the equipment.

24. Terra Nova purchased the electric heat pump for \$3,034.55.

25. Terra Nova purchased the concrete pool pad for \$400.00. The fiberglass pool pad would have cost \$100.00.

26. The claimant paid Terra Nova a total of \$17,750.62. This amount included a \$500.00 credit card service charge.

27. Terra Nova is a licensed home improvement contractor in Maryland.

28. The Claimant's pool was completed during the summer of 2015.

29. In late 2015, the Claimant received a notice that the Respondent had filed for bankruptcy. The Claimant is not a party to the bankruptcy action.

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

31. The Contract contains an arbitration clause. The parties did not initial and date any portion of the page containing the arbitration clause.

32. 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.

DISCUSSION

The Merits of this Case

Legal Framework

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)).

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) (2015);⁵ *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. However, the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney’s fees, court costs, or interest, and may not compensate a claimant for more than was paid to the original contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(1).

Certain claimants are excluded from recovering from the Fund altogether. In this regard, a claimant must prove that: (a) the claimant resides in the home as to which the claim is made, or he owns no more than three dwelling places; (b) the claimant is 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 claimant did not unreasonably reject the contractor’s good faith effort to resolve the claim; (e) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (f) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (g) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1); Md. Code Ann., Bus. Reg. § 8-101(g)(3)(i) (Supp. 2016).

⁵ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

For the reasons that follow, I find that the Claimant has proven eligibility for compensation.

Statutory Eligibility

The undisputed evidence in this case establishes there are no *prima facie* impediments barring the Claimant from recovering from the Fund. *Id.* The Claimant filed his Claim within three years of learning that the Respondent had closed its business and would not be completing the work on his pool. The Claimant testified that the home improvement work at issue in this case concerned his pre-existing personal residence in Maryland, which is the only residential property that he owns; neither he or his wife were an employee, officer or partner of the Respondent and neither he, nor his wife are related to any of the Respondent's employees, officers or partners; the Respondent made no reasonable effort to resolve the claim in this matter;⁶ and the Claimant has not taken any other legal action to recover monies for the Respondent's failure to complete the pool.

The remaining prerequisite under section 8-405 of the Business Regulation Article is the requirement that the Claimant complies with the arbitration clause contained in the Contract before seeking compensation from the Fund.

In order to be enforceable, an arbitration clause in a home improvement contract must contain: (1) the name of the person or organization that will conduct the arbitration; (2) whether any mandatory fees will be charged to the parties for participation in the arbitration and include

⁶ The Respondent's offer to complete the pool, provided the Claimant pay approximately \$12,000.00 to cover the cost of equipment for which he had already paid, is unreasonable. Although the Respondent indicated that it would try to reimburse the Claimant for this payment at unknown time in the future, I find that requiring the Claimant to pay such a large sum, even on a temporary basis, is not reasonable. In light of the Respondent's financial circumstances, the Claimant could not have reasonably relied upon the Respondent's offer of reimbursement. Further, the Respondent shut down its business two days after making this offer, and therefore, could not have followed through with the offer.

the fee schedule; (3) whether the arbitrator's findings are binding; *and* (4) a disclosure that, under Business Regulation Article, §8-405(c), 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. COMAR 09.08.01.25A. In addition, the parties shall affix their initials and date immediately adjacent to any mandatory arbitration clause in a home improvement contract, at the time of execution of the contract. COMAR 09.08.01.25B.

The arbitration clause contained in the Contract states, in pertinent part, as follows:

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

The costs of arbitration shall become by the losing party or shall be borne in such proportions as the arbitrators determine. The fees of arbitration to the person or company requesting the arbitration are as follows ...

Under Business Regulation Article [§]8-405(c), 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.

CL Ex. 1.

Based upon the evidence in the record, I find that the arbitration clause fails to fully comply with the provisions of COMAR 09.08.01.25A. The arbitration clause does not contain the name of the person or organization that will conduct the arbitration; nor does it address whether the arbitrator's findings are binding. Further, the parties did not initial and date the portion of the Contract containing the arbitration clause. Failure to comply with any one of the provisions of COMAR 09.08.01.25A or B is sufficient to render an arbitration clause unenforceable. *See* COMAR 09.08.01.25A, B. Since the arbitration clause contained in the contract is unenforceable, the Claimant is not required

to comply with the clause and it was appropriate for the MHIC to forward this Claim for a merits hearing.⁷

Was the Home Improvement Unworkmanlike, Inadequate or Incomplete?

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. There is no allegation that the home improvement work performed by the Respondent was either unworkmanlike or inadequate. However, the undisputed evidence establishes that the Respondent failed to complete installation of the pool, as provided by the Contract. The Claimant paid the Respondent the entire amount owed under the Contract and the Respondent essentially left the Claimant with a large, concrete-coated hole in his backyard. *See* CL Ex. 3. The Respondent failed to apply the interior finish to the pool and install the pool equipment. After abandoning the job, the Respondent went out of business and filed for bankruptcy.

The Claimant testified that after the Respondent shut down its business around late-May 2015, the Claimant contracted with Terra Nova to complete the work which the Respondent left incomplete. The Claimant further testified that with two exceptions, Terra Nova performed the work with the same specifications contained in his Contract with the Respondent. Jon Coakley, who was the Claimant's Maryland Pools salesman and is now employed by Terra Nova, corroborated the Claimant's testimony on this point.

⁷ COMAR 09.08.03.02E provides that when a contract between a claimant and a contractor requires that all contract disputes be submitted to binding arbitration, the claimant shall either submit their dispute to binding arbitration as required by the contract; or provide evidence to the MHIC 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. Since the arbitration clause in this case does not indicate that arbitration would be binding, I find that this regulation does not apply. In addition, I note that the Respondent never advised the Claimant, the MHIC or the OAH of any intention to participate in arbitration of the issues underlying this Claim. The Respondent has not sought to stay the Claim based on the arbitration clause. Even if I were to assume the arbitration clause was binding, I find that by failing to take any action to enforce the arbitration clause, the Respondent has waived any right to arbitration that might have otherwise existed.

I thus find that the Claimant is eligible for compensation from the Fund.

Amount of Actual Loss

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. 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).

In this matter, the Claimant paid the Respondent directly, and also incurred costs paid over and above the Contract to complete the pool. I find that the amounts paid to Terra Nova are reasonable, given that Terra Nova largely performed work with the same specifications contained in the Contract with the Respondent, as discussed above.

With regard to the two upgrades made to the Contract, I find that the following amounts were paid for upgrades to equipment, and therefore not included in the Contract:

Upgrade	Electric heat pump	\$3,034.55 ⁸	Concrete pad	\$400.00 ⁹
Original	<u>Gas heater</u>	<u>-\$2,700.00¹⁰</u>	<u>Fiberglass pad</u>	<u>\$100.00¹¹</u>
Excess		\$ 334.55		\$300.00

⁸ See CL Ex. 6.

⁹ See CL Ex. 6.

¹⁰ See CL Ex. 5.

¹¹ Mr. Coakley testified that the cost of the fiberglass pad would have been approximately \$100.00.

Further, the \$500.00 credit card service charge is an amount paid outside of the scope of the Contract.

Based on the foregoing, I find that the Claimant paid the following amount for Terra Nova to complete the Contract:

Total amount paid to Terra Nova	\$17,750.62
Excess amount paid for electric heat pump	\$ 334.55
Excess amount paid for concrete pad	\$ 300.00
<u>Credit card service fee</u>	<u>- \$ 500.00</u>
	\$16,616.07

The Claimant's actual loss is as follows:

Amount paid to Respondent	\$ 43,558.00
<u>Amount paid to Terra Nova to complete Contract</u>	<u>+ \$ 16,616.07</u>
TOTAL	\$ 60,174.07
<u>Contract Price (to be paid to Respondent)</u>	<u>- \$ 43,425.00¹²</u>
Actual Loss	\$ 16,749.07

The amount of the Claimant's actual loss is within the statutory cap on claims against the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (e)(5). Thus, the Claimant's recovery is for the full amount of his actual loss, \$16,749.07.

This case is only one of many against the Respondent. 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 \$16,749.07 to the Claimant, this award may be limited by the statutory cap of section 8-405(e)(2).

¹² \$43,425.00 is the original pool price provided for in the February 6, 2015 Contract, minus the \$2,320.00 price change provided for in the April 14, 2015 Contract Addendum.

PROPOSED CONCLUSION 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 \$16,749.07, 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 \$16,749.07, unless otherwise limited by section 8-405(e)(2) of the Business Regulation Article; and; 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;¹³ and

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

Signature on File

September 25, 2017
Date Decision Issued

Jennifer A. Nappier
Administrative Law Judge

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JAN/sw
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¹³ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 3rd day of November, 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.

J. Jean White

***I. Jean Whitez
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION