IN THE MATTER OF THE CLAIM	*	**BEFORE SUSAN A. SINROD,**
OF AMY ROSENDALE,	*	**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 ARTHUR TATE, JR.	*	
T/A NOVA BUILDERS	*	**OAH No.: DLR-HIC-02-18-24265**
RESPONDENT	*	**MHIC No.: 17 (90) 1180**

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PROPOSED DECISION

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STATEMENT OF THE CASE

On December 8, 2017, Amy Rosendale (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $38,159.00 in actual losses allegedly suffered as a result of work performed under a home improvement contract with Arthur Tate, Jr. t/a Nova Builders (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On August 1, 2018. the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I conducted a hearing on November 27, 2018 at Tawes State Office Building, Department of Natural Resources, 580 Taylor Avenue, Annapolis, Maryland. Md. Code Ann., Bus. Reg. § 8-

407(e) (2015).[1] Andrew Brower, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. The Claimant represented herself. David Love, Esquire, represented the Respondent, who was present.

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. 2018); Code of Maryland Regulations (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' acts or omissions?

2. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted the following exhibits, which were admitted into evidence, unless otherwise noted:

Cl. Ex. #1- Imagine Pools brochure, undated

Cl. Ex. #2- Not Admitted

Cl. Ex. #3- Contract between the Claimant and the Respondent, dated October 15, 2016

Cl. Ex. #4- Complaint, dated April 24, 2017

Cl. Ex. #5- Statement of Claimant, filed with the Fund

Cl. Ex. #6- Twenty-two photographs of pool being installed

Cl. Ex. #6(a)- Photograph of pool

Cl. Ex. #6(b)- Photograph of jack located under the deep end of the pool

[1] Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

Cl. Ex., #6(c)- Photograph of photograph of post upon which jack was located

Cl. Ex #7- Proposal, Stewart Lawn & Landscape, dated July 25, 2017

Cl. Ex. #8- Proposal, Sunrise Pools & Spas, dated October 19, 2017

The Respondent submitted the following exhibits, which were admitted into evidence unless otherwise noted:

Resp. Ex. #1- Email from Mark Weeks to the Claimant, dated November 16, 2016

Resp. Ex. #2- Letter from David B. Love, Esquire to the Claimant and Mr. Rosendale, dated June 23, 2017

Resp. Ex. #3- Letter from the Claimant and Mr. Rosendale to David B. Love, Esquire, dated June 23, 2017

Resp. Ex. #4- Offer of Settlement-Without Prejudice, dated June 27, 2017

Resp. Ex. #5- Withdrawn

Resp. Ex. #6- Never Offered

Resp. Ex. #7- Emails between Zena, Respondent's employee, and the Claimant, dated January 18 and January 20, 2017

Resp. Ex. #8- Department of Inspections and Permits Permit Internet Inspection Request Summary, for inspection dated March 22, 2017

Resp. Ex. #9- Four photographs of pool installation

The Fund submitted the following exhibits, which were admitted into evidence:

Fund Ex. #1- Hearing Order, dated July 30, 2018

Fund Ex. #2- Notice of Hearing, dated September 26, 2018

Fund Ex. #3- Letter from the Department to the Respondent, dated January 29, 2018, with Claim attached

Fund Ex. #4- Respondent's Licensing History, as of November 26, 2018

Testimony

The Claimant testified and presented the testimony of Joe Rosendale, the Claimant's husband.

The Respondent presented the testimony of the following witnesses:

1. Mark Weeks, President, accepted as an expert witness in pool construction;

2. Albert Rice, employee of the Respondent;

3. Nicholas Carey, employee of the Respondent.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

After considering the evidence presented, 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 01 45377.

2. On October 15, 2016, the Claimant and the Respondent entered into a contract, wherein the Respondent agreed to install a white fiberglass swimming pool in the Claimant's backyard (Contract). The Contract stated that work would begin on November 14, 2016 and would be completed within approximately thirty-five days if not delayed by delayed delivery of materials, weather, or other conditions beyond the control of the Respondent.

3. The original agreed-upon Contract price was $33,650.00. The price was later increased to $40,210.00 because the Claimant and her husband Joe Rosendale ultimately chose a larger pool than that for which they originally contracted. The Claimant and Mr. Rosendale chose a larger pool manufactured by Imagine Pools.

4. At some point after execution of the contract, Mark Weeks, President of the Respondent, informed the Claimant that the larger pool that she and Mr. Rosendale selected was not available in white. Instead, the Claimant chose ice silver, which was the closest color to white.

5. On November 16, 2016, Mr. Weeks informed the Claimant by email that the larger pool she had chosen was not available in ice silver, and that the closest color was storm grey. Mr. Weeks subsequently spoke by telephone with Mr. Rosendale, who accepted the new price for the larger pool and the storm grey color.

6. On October 10, 2016, the Claimant paid the Respondent a deposit of $3,500.00. On January 20, 2017, the Claimant paid the Respondent in two checks, one in the amount of $26,560.00 and one in the amount of $5,000.00.

7. On January 19, 2017, the Respondent began excavation for the pool.

8. The pool was delivered to the Claimant's home on January 20, 2017. On January 23, 2017, the Respondent installed the pool shell, which sat for several weeks in the excavated hole before the Respondent began to backfill the pool.

9. Approximately six weeks after the delivery of the pool, the Claimant and Mr. Rosendale met with Mr. Weeks to discuss the layout of their patio. At that time, Mr. Rosendale informed Mr. Weeks that the Claimant did not like the color of the pool. After speaking with the pool manufacturer, the Respondent offered $2,500.00 in extra pavers to the Claimant, in an effort to mitigate the Claimant's dissatisfaction with the color.

10. At the time the Claimant informed the Respondent of her dissatisfaction with the color of the pool, the Respondent had already begun the backfill for the pool, and had cut holes into the pool for the plumbing.

11. The Claimant did not find the $2,500.00 in extra pavers to be sufficient to remediate her dissatisfaction with the color of the pool. She wanted either the pool to be replaced or a substantial dollar amount in compensation for the wrong pool color.

12. After further discussion regarding the color of the pool with no resolution, the Claimant asked the Respondent to leave the job and not return to finish installation of the pool.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Md. Code Ann., Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) ("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." Md. Code Ann., Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Claimant testified that when she and Mr. Rosendale met with Mr. Weeks in March 2017, they told Mr. Weeks that the pool was the wrong color and he agreed. He ultimately contacted the distributor who offered the $2,500.00 in extra pavers, which was not acceptable to the Claimant and Mr. Rosendale as a resolution. The Claimant denied that she received the November 16, 2016 email from Mr. Weeks, which informed her that the larger pool she had chosen was only available in the storm grey color. Resp. Ex. #1. The Claimant testified that the Respondent offered to paint the pool a different color; however, the Claimant contacted the manufacturer who said that if the pool was painted, the warranty would be void.

The Claimant testified that the only resolution she would have accepted would have been for the Respondent to either to replace the pool or offer a substantial dollar amount in compensation. The Claimant conceded that she asked the Respondent to leave the property without completing the project because they were unable to resolve the problem with the color of the pool. The Claimant noted that she contacted the Respondent again subsequently, and the Respondent told her that they were ready to finish the pool if the Claimant paid the remaining amount due on the contract. The Claimant did not want to do so, because she was dissatisfied with the color and did not want that pool.

Mr. Rosendale testified that he tore the pool out of the excavation himself, by hand, and as he did so, he discovered that the installation was unworkmanlike. He conceded that the pool was destroyed during the removal process. He presented pictures he described to depict that there was no concrete collar around the pool, there was no backfill to support the pool, the pool was supported by a two by four post with a bottle jack, and steel was buried in the pool that rusts when it gets wet. Cl. Ex. #6. Mr. Rosendale and the Claimant also testified that the pool was not level. According to Mr. Rosendale, other contractors told him that the concrete collar was insufficient. Mr. Rosendale said that when he attempted to get proposals to repair the pool, no company would do it because of the unworkmanlike quality of the work that had already been done. Mr. Rosendale said that he did not object to the color of the pool when it was first delivered because he could not see the color and did not initially know it was the wrong color.

Mr. Weeks was accepted as an expert witness in pool construction. He testified that in March 2017, several weeks after the pool had been delivered, he met with the Claimant and Mr. Rosendale to discuss the layout of their patio. It was at that time that Mr. Rosendale told him the Claimant did not like the color of the pool. According to Mr. Weeks, the pool was the color the Claimant and Mr. Rosendale ordered. Mr. Weeks agreed they initially talked about both colors,

and he knew the Claimant preferred the ice silver color. However, he informed the Claimant by the November 16, 2016 email that the larger pool was not available in ice silver. He presented the email at the hearing. Resp. Ex. #1. He testified that he spoke to Mr. Rosendale after he sent the email, and Mr. Rosendale accepted the price and the storm grey color. Mr. Weeks insisted that he would not have proceeded to order the pool if Mr. Rosendale had not told him to do so. Mr. Weeks presented pictures of the pool being delivered and inserted into the excavated hole, and maintained that the color was visible from the beginning and sat there for several weeks with no complaint from the Claimant. Therefore, the Respondent began the installation of the pool.

Mr. Weeks said the original pool the Claimant and Mr. Rosendale ordered came in white. However, they changed their minds and wanted the larger pool, and selected Imagine Pools which did not offer white. Mr. Weeks maintained that, had the Claimant told him immediately upon delivery that she did not like the color of the pool, he could have easily removed it. However, by the time Mr. Rosendale told him of the problem, the Respondent had completed enough work, which included cutting the pool for plumbing, that removal would have been difficult and expensive. Mr. Weeks said that the manufacturer would not have taken it back at that point; he would have had to clean it up and resell it. Mr. Weeks said the shell was worth $20,000, it would have cost him $5,000.00 to have it removed, and he would likely have incurred significant shipping costs, considering how expensive it is to send an oversize load from state to state. Mr. Weeks insisted that the offer of $2,500.00 in additional pavers was simply to be professional; he did not order the wrong color. Mr. Weeks conceded that he never spoke to the Claimant or Mr. Rosendale about whether they would pay for removal of the pool; he felt it was clear by their demeanor that they would not bear that cost.

In his testimony, Mr. Weeks explained some of the issues Mr. Rosendale raised regarding his claim that the work the Respondent had done so far was unworkmanlike. He said that the

bottle jacks Mr. Rosendale complained about were temporary, to hold the pool up during the installation process. He explained the location of the jack is marked on the outside of the pool with a magic marker, and the jack would have been removed at the very end of the installation. Regarding the backfill, Mr. Weeks explained that once the pool is installed and backfilled, several layers of soil are tamped down around the pool, and additional soil is added over a ten-day to two-week period, giving the soil the time to fully compact. At this point, a small concrete rim had been poured around the pool which was not intended to be the collar; this is depicted one of Mr. Rosendale's pictures. Cl. Ex. #6(b). Mr. Weeks testified that the collar had not yet been poured; they intended to come back to complete it after they laid the patio. Mr. Weeks explained the installation process and insisted that the work the Respondent completed on the pool was proper according to industry standards. Mr. Weeks pointed out that despite Mr. Rosendale's claim that the pool was not level, the pool was level the last time the Respondent was there; however, after sitting incomplete for six to eight months without a finished patio, surface water likely got underneath the pool causing it to settle. Mr. Weeks testified that Mr. Rosendale unnecessarily removed the pool by hand and destroyed it; it could have been salvaged if the plumbing had been properly unhooked and the pool lifted out with a crane.

Both Albert Rice and Nicholas Carey, employees of the Respondent, were present at the Claimant's house when the pool was delivered. They both testified that the color of the pool was very visible, and they saw no sign of dissatisfaction. Mr. Rice testified that Mr. Rosendale seemed excited about the pool when it was delivered. The Respondent also submitted pictures of the pool being delivered and sitting in the excavated hole; the color of the inside of the pool is visible. Resp. Ex. #9.

The Claimant did not present any evidence, other than Mr. Rosendale's testimony, to establish that any work the Respondent performed was unworkmanlike. Mr. Rosendale

conceded that although he is a contractor himself, he is not knowledgeable regarding pool installation. Mr. Rosendale was disturbed about the fact that when he tore the pool out of the ground, he found the pool being supported by bottle jacks and two by fours. I found Mr. Weeks' testimony to be credible regarding the process of pool installation, the use of bottle jacks and wood posts, and the pouring of the collar around the pool. Thus, I have no reason to conclude that the work the Respondent completed on the Claimant's pool was not proper and in accordance with industry standards. Mr. Rosendale did not like what he saw; however, that, in and of itself did not make it unworkmanlike. He testified that no contractor would repair the pool due to the unworkmanlike quality of the Respondent's work.[2] However, the Claimant did not present any testimony or reliable evidence, expert or otherwise, that contradicted Mr. Week's' testimony which I found to be credible. Therefore, the only issues to be decided are whether the Respondent installed a pool that was the wrong color, and if so, whether that constitutes unworkmanlike, inadequate, or incomplete home improvement.

There is no dispute that the Claimant and Mr. Rosendale informed the Respondent of their dissatisfaction with the color of the pool for the first time in March 2017, approximately six weeks after the pool was delivered. The Claimant testified that she and Mr. Rosendale tried to meet with Mr. Weeks sooner to discuss the color of the pool, but Mr. Weeks could not meet them until March. Contrarily, Mr. Weeks testified that the meeting in March was scheduled to discuss the layout of the patio, and it was then that Mr. Rosendale told him for the first time that the Claimant was dissatisfied with the color. At that point, the Respondent had already begun installation of the pool. In her closing argument, the Claimant conceded that she and Mr. Rosendale had "gone back and forth" about the color during that period of time before the meeting in March.

[2] It was unclear from Mr. Rosendale's testimony why he would have inquired into "repair" of the pool, since he and the Claimant did not want the installation of that particular pool to be completed.

I have no basis upon which to question the validity of the November 16, 2016 email from Mr. Weeks to the Claimant informing her that the larger pool they had chosen was not available in ice silver, and storm grey was the only option. Resp. Ex. #1. The Claimant said she never received it; however, there was no evidence that led me to believe the email was somehow fraudulent or contrived for the purpose of the hearing. I do not believe that the Claimant was untruthful when she said that she personally did not receive the email; however, I have no reason to believe that the email was fabricated. When I compare it to another email between the Claimant and the Respondent in the record, it looks the same. Resp. Ex. #7. They both are printed from the same Xfinity email address, and the Claimant agreed she received the other email from Zena, the Respondent's employee. Resp. Ex. #7. The interaction that followed the November 16, 2016 email was a telephone call between Mr. Weeks and Mr. Rosendale, during which Mr. Rosendale gave the go-ahead for the storm grey pool. I found Mr. Weeks' testimony to be credible and convincing that he would not have ordered the pool had Mr. Rosendale not told him that the color and the price were acceptable. There would have been no reason for him to do so and risk the possibility that the pool would have to be returned.

There is no dispute that once the pool was delivered in January 2017, the pool sat in the excavated hole for approximately six weeks prior to the meeting in March when Mr. Rosendale told Mr. Weeks of the Claimant's dissatisfaction with the color. At that point it was too late to simply exchange the pool. The Claimant said she tried to get together with Mr. Weeks to discuss the color, but Mr. Weeks could not meet until March. The parties sometimes communicated by email as evidenced by some of the exhibits in the record; however, there is no evidence in the record of any emails to Mr. Weeks regarding the Claimant's dissatisfaction with the color or any attempts to set up a meeting to discuss the color. It was only after the work started, when

removal of the pool would have been expensive and it could not have been returned to the manufacturer, that the Claimant communicated her dissatisfaction about the color to Mr. Weeks.

I conclude that the evidence the Claimant submitted did not establish that the Respondent's actions constituted inadequate, incomplete or unworkmanlike home improvement. I found the Claimant, Mr. Rosendale and Mr. Weeks to be credible witnesses. After the pool sat in the Claimant's backyard for a period of time, during which time the Claimant was uncertain whether she liked the color of the pool, she decided the color was unsatisfactory, wanted it removed, and told the Respondent that no further work was to be performed without resolution of the color issue or substantial compensation. From the evidence before me, it appears that perhaps the breakdown in communication occurred between Mr. Rosendale and the Claimant, when Mr. Rosendale spoke to Mr. Weeks after receiving the November 16, 2016 email and told Mr. Weeks to order the larger pool in storm grey.

The evidence the Claimant submitted did not establish that she suffered an actual loss due to the Respondent's incomplete, unworkmanlike or inadequate home improvement. Based on my analysis herein, I must conclude that the Claimant did not establish eligibility for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

Signature on File

January 24, 2019
Date Decision Issued

Susan A. Sinrod
Administrative Law Judge

SAS/cj
#177518

PROPOSED ORDER

WHEREFORE, this 25th day of March, 2019, 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 Shilling

Michael Shilling
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION