

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1141

September Term, 2014

GLEN VALLEY BUILDERS, LLC

v.

JAMES S. WHANG, et al.

Wright,
Hotten,
Reed,

JJ.

Opinion by Hotten, J.

Filed: October 6, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Glen Valley Builders LLC (“Glen Valley”) through its sole principal, Lewis Friedman (“Mr. Friedman”), entered into a contract with appellees, James S. Whang and Haibin E. C. Whang (“the Whangs”) to improve and provide an addition to the Whangs’ home in Potomac, Maryland. In February of 2012, after completion of the work on the Whangs’ home, Glen Valley sued the Whangs in the Circuit Court for Montgomery County alleging that the Whangs had wrongfully withheld payment due to Glen Valley under the contract. The Whangs filed a motion to dismiss and/or for summary judgment, alleging that the contract between the parties was unenforceable because Glen Valley lacked a Maryland Home Improvement License. On July 8, 2014, the circuit court granted summary judgment in favor of the Whangs, and Glen Valley appeals, presenting five questions for our review, which we consolidate and reorder as follows:

- I. Did the circuit court err in deciding that Glen Valley was precluded from recovering against the Whangs for not having a home improvement license, where Mr. Friedman held a building contractor’s license in his individual capacity?
- II. Did the circuit court err in granting summary judgment on the grounds that Glen Valley had failed to substantially comply with the Maryland Home Improvement Law?
- III. Did the circuit court err in holding that the construction on the Whangs’ home was “home improvement” as opposed to “new construction?”
- IV. Did the circuit court err in disregarding evidence that the Whangs knew Glen Valley would utilize Mr. Friedman’s personal license in performing the contract?

For the reasons that follow, we shall reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

Lewis Freidman is the sole proprietor and operator of Glen Valley. Mr. Friedman has maintained a Montgomery County New Home Builder (“MC NHB”) license since 2001, aside from a period of six months in 2009 where he failed to renew his license. Glen Valley has never held an MC NHB license.

On April 10, 2009, the Whangs contracted to buy a single family home at 11809 Centurion Way in Potomac, Maryland from Lewis Freidman and his spouse for the price of \$3,550,000. This contract of sale was made contingent upon Mr. Friedman completing various construction projects at the house, such as repairing roofing slates and adding wiring for audio visual equipment. The contract of sale also required that “[s]ellers shall pass final inspections for the house and obtain occupancy permits.” On June 2, 2009, the Whangs closed on this sale.

On February 19, 2010, Mr. Friedman, Glen Valley, and the Whangs entered into a “CONSTRUCTION CONTRACT (OR AGREEMENT) BETWEEN HOMEOWNER AND GENERAL CONTRACTOR FOR CONSTRUCTION OF A CUSTOM HOME ADDITION At 11809 Centurion Way, Potomac, MD 20854” (hereinafter “the construction contract”). The construction contract called for an expansion of the existing structure at Centurion Way, and contained the following provisions:

Construction Contract and All Associated Documents
For an Addition Project to Existing House at
11809 Centurion Way, Potomac MD 20854

Owners:
James S. and Haibin E.C. Whang

Builder or General Contractor:
Glen Valley Builders, LLC
(Represented by Lewis Friedman)

THIS AGREEMENT (Or Construction Contract) is made on the 19th day of February in the Year of 2010 by and between Homeowner (or "Homeowners" or "Owner") [i.e., Mr. James S. Whang and Haibin E.C. (Elena) Whang] with principal residence at 11809 Centurion Way, Potomac, MD 20854 and the General Contractor (or "Builder") (i.e. Glen Valley Builders LLC) with principal office located at 13110 Glen Road, North Potomac, MD 20878 for the following addition project (or the "Addition Project"), i.e., the construction of an addition to the existing home at 11809 Centurion Way Potomac MD 20854 and for certain alterations and improvements to the existing home (or the "Existing Home").

The parties then signed the contract in the following capacities:

Owner: _____ (James S. Whang) []

Owner: _____ (Haibin E.C. Whang) []

Builder: _____
(Lewis Friedman for Glen Valley Builders LLC)
Builder's License Number for Montgomery County, MD, BC 3609

Guarantor:

I, Lewis Friedman, (residing at 12305 Glen Road, Potomac MD 20854), being the General Member of Glen Valley Builders LLC hereby personally co-sign and guarantee to perform all of Builders or General Contractor's obligations set forth in this entire Construction Contract or Agreement.

Signed _____ []
(Lewis Friedman)

Pursuant to the contract, construction continued through December of 2011, and between February 26, 2010 and April of 2012, the Whangs paid Glen Valley a total of \$2,220,000. On July 12, 2012, counsel for Glen Valley sent a demand letter to the Whangs

for payment still due under the contract. The Whangs responded to this letter by noting, among other things, that there was incomplete and defective work, and that Glen Valley “is an unlicensed home improvement contractor.”

On February 12, 2014, Glen Valley sued the Whangs in the Circuit Court for Montgomery County for the outstanding balance.¹ Mr. Friedman was not joined as a party to this suit. After some discovery, the Whangs filed a Motion to Dismiss and/or for Summary Disposition. According to the Whangs, the construction contract was unenforceable because Glen Valley did not have a home improvement license as required by the Maryland Home Improvement Law (“MHIL”), nor did Glen Valley have a MC NHB license. Glen Valley opposed this motion on the grounds that (1) the MHIL is inapplicable because the construction contract was for “new construction,” not “home improvement,” (2) assuming, *arguendo*, that the contract was for “home improvement,” Glen Valley was exempt from the MHIL, and (3) Lewis Friedman possessed an MC NHB license making Glen Valley compliant with the MHIL.

After hearing oral argument on the motion, the circuit court granted summary judgment in favor of the Whangs in an order dated July 9, 2014. The circuit court ruled that the construction at issue was “home improvement” which the MHIL defines as “the addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building or part of a building that is used or designed to be used as a residence.” The Court further ruled that Mr. Friedman’s maintenance of a MC NHB

¹ Glen Valley asserted claims for breach of contract, unjust enrichment, *quantum meruit* and fraud.

license was not sufficient to exempt Glen Valley from the licensing requirement of the MHIL, where Glen Valley, not Mr. Friedman, was the plaintiff before the court.

The circuit court then addressed the question of whether there had been “substantial compliance” with the MHIL, which would permit Glen Valley to seek enforcement of the construction contract, despite Glen Valley’s failure to strictly comply with the licensing requirement. On this point, the circuit court relied on the decisions of this Court in *Baltimore Street Builders v. Stewart*, 186 Md. App. 684 (2009), and *DeReggi Construction Co. v. Mate*, 130 Md. App. 648 (2000). The circuit court observed that in cases where this court and others have found substantial compliance, “shortly after the contract at issue was signed, the contractor obtained a license, the defendant was not prejudiced, and the purpose of the statute [– the protection of consumers –] was accomplished even though the contractor had not strictly complied with the dictates of the licensing law.”

The circuit court then observed that Glen Valley has made no attempt to obtain a license at any time either before or after the execution of the contract with the Whangs. Additionally, the court noted that Montgomery County has received no information concerning the credits or assets of Glen Valley, thereby ensuring financial stability of the contractor. Lastly, the court indicated that the Whangs would be unable to seek an administrative remedy through the Montgomery County Home Improvement Fund, because this fund only covers claims against licensed contractors. Thus, the court concluded that Glen Valley had failed to substantially comply with the MHIL and was unable enforce the construction contract against the Whangs.

Appellant, Glen Valley, filed a notice of appeal with the circuit court on August 8, 2014.

Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

The standard of review for a motion for summary judgment was outlined by this Court in *Syme v. Marks Rentals, Inc.*, 70 Md. App. 235, 238-39 (1987), in which we explained:

[w]hen ruling on a motion for summary judgment, the trial court must address two separate issues: whether the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine dispute as to any material fact and whether the movant is entitled to judgment as a matter of law.

In determining whether a material fact is in dispute, a trial court must give great deference to the non-moving party, and must review the record in the light most favorable to the non-moving party. *Lipscomb v. Hess*, 255 Md. 109 (1969); *see also Lawless v. Merrick*, 227 Md. 65 (1961), and *Howard Cleaners of Baltimore, Inc. v. Perman*, 227 Md. 291 (1961). The standard for appellate review of a trial court's grant of a motion for summary judgment is whether the trial court was legally correct, or *de novo*. *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737 (1993); *Heat & Power v. Air Products*, 320 Md. 584, 590-92 (1990).

DISCUSSION

Background Law

Because this case concerns both a local and statewide licensing requirement for building contractors, it is necessary to start with some background on these two statutory schemes.

The Maryland Home Improvement Law (“MHIL”) is codified at Md. Code (Repl. Vol. 2015), §§ 8-101 through 8-702 of the Business Regulation Article (“Bus. Reg.”). Under Bus. Reg. § 8-301(a), “a person must have a contractor license whenever the person acts as a contractor in the State.” Bus. Reg. § 1-101(g) defines “person” as “an individual, receiver, trustee, guardian, personal representative, fiduciary, representative of any kind, partnership, firm, association, corporation, or other entity.” Further, “[c]ontractor” means a person, other than an employee of an owner, who performs or offers or agrees to perform a home improvement for an owner.” Bus. Reg. § 8-101(c).

The Montgomery County Code provides for its own contractor license – the Montgomery County New Home Builder’s License (“MC NHB”). Under Montgomery County Code § 31C-2(a)(1), “[a] builder must not engage in the business of constructing new homes or act in the capacity of a building contractor in the County unless the builder is licensed by the Office.” Montgomery County Code § 31-C1(2) defines “Builder” as “any person or business organization ... [t]hat is engaged in the business of erecting or otherwise creating a new home; or ... [t]o whom a completed new home is conveyed for resale in the course of the business of the person or business organization.”

As previously mentioned, Glen Valley did not hold either an MHIL license or an MC NHB license. Mr. Freidman maintained an MC NHB license at all times relevant to the present dispute, but Mr. Friedman was not licensed under the MHIL.

I. Did the circuit court err in deciding that Glen Valley was precluded from recovering against the Whangs for not having a home improvement license, where Mr. Friedman held a building contractor's license in his individual capacity?

Glen Valley first argues that licensing statutes should not be applied mechanically to mandate an unlicensed contractor's forfeiture, and the circuit court erroneously "reduc[ed] the issue of whether Glen Valley could recover [to] ... whether Glen Valley had a building license in its own name." According to Glen Valley, "Mr. Friedman's agreement as a licensed builder to perform and be responsible for the construction work is all that is needed to bring the Construction Contract within the applicable licensing requirements."

The Whangs respond by noting that a party "may not file an action in a Maryland court to enforce rights related to its unlicensed activities[.]" and this rule has been consistently enforced against unlicensed builders. According to the Whangs, Glen Valley, the contractor named in the contract, was without a contractor license during the execution and performance of the construction contract and is therefore precluded from maintaining a suit against the Whangs in a Maryland court. The Whangs also dispute the characterization of Mr. Friedman as a "party to the contract" who agreed to perform the duties of the contractor or builder. According to the Whangs, Mr. Friedman signed the contract in the accessory role of a guarantor, and would only become liable in the event of

Glen Valley's default. Thus his licensing status is irrelevant for the purpose of determining whether Glen Valley maintained the required contractor's license.

For the reasons that follow, we hold that Mr. Friedman's maintenance of an MC NHB license was sufficient to create a material factual dispute concerning Glen Valley's compliance with the MHIL licensing requirement.

In *Baltimore Street Builders v. Stewart*, this Court stated that "if the Legislature does not indicate otherwise, [the court assumes] that contracts made by unlicensed persons subject to regulatory statutes designed to protect the public are illegal as against public policy and will not be enforced." 186 Md. App. at 695 (quoting *S.A.S. Personnel Consultants Inc. v. Pat-Pan, Inc.*, 286 Md. 355, 341 (1979)). This Court then went on to note that the MHIL "is a regulatory statute designed for the protection of the public." 186 Md. App. at 695 (citation omitted). Accordingly, a "person" engaging in home improvement must comply with the MHIL to enforce a construction contract in the Maryland courts.

In the case at bar, there was a material factual dispute concerning Glen Valley's compliance with the MHIL, because Mr. Friedman, a licensed MC NHB contractor, was arguably a party to the construction contract. Although Mr. Friedman was labeled a "Guarantor" under the contract, he also guaranteed "to perform all of [b]uilder's or [g]eneral [c]ontractor's obligations." This wording resulted in ambiguity concerning Mr. Friedman's status as a "party" to the contract, and this ambiguity was material because Mr. Friedman's personal MC NHB license may exempt Glen Valley from the licensing

requirement of the MHIL.² Accordingly, we hold that the circuit court should have resolved the ambiguous wording of the construction contract in Glen Valley's favor, and denied summary judgment as a matter of law. *See generally John L. Mattingly Const. Co. v. Hartford Underwriters Ins. Co.*, 415 Md. 313, 318 (2010) (holding that the circuit court erred in granting summary judgment on the basis of ambiguous contractual language).

On remand, the finder of fact may conclude that Mr. Friedman was not party to the construction contract and/or that Mr. Friedman's personal contractor's license was not applicable to Glen Valley. We merely hold that the circuit court's determination of these facts on summary judgment was premature.

² Glen Valley contends that if Mr. Friedman's MC NHB license was attributable to Glen Valley, then Glen Valley would be exempt from the MHIL. Glen Valley bases this claim on Bus. Reg. § 8-301(d), which excludes the following individuals from the licensing requirements of the MHIL:

- (4) an architect, electrician, plumber, heating, ventilation, air-conditioning, or refrigeration contractor, or other person who:
 - (i) is required by State or local law to meet standards of competency or experience before engaging in an occupation or profession;
 - (ii) currently is licensed in that occupation or profession under State or local law; and
 - (iii) is:
 - 1. acting only within the scope of that occupation or profession[.]

II. Did the circuit court err in granting summary judgment on the grounds that Glen Valley had failed to substantially comply with the MHIL?

Glen Valley alleges that the circuit court erred in granting summary judgment because “[t]here were multiple disputed issues of fact” bearing upon “substantial compliance” with the MHIL. As discussed below, we agree, and hold that the circuit court erred in granting summary judgment, where there was a material factual dispute concerning Glen Valley’s substantial compliance with the MHIL.³

We begin with a discussion of two cases concerning the principal of “substantial compliance” in the context of the MHIL and MC NHB licensing requirements.

First, in *DeReggi Construction Company v. Mate*, DeReggi, a Maryland general partnership, had entered into a contract with Mate for the construction of a custom home in Montgomery County. 130 Md. App. 648, 652 (2000). At the time this contract was formed, DeReggi did not have an MC NHB license, although DeReggi obtained one prior to beginning work pursuant to the contract. *Id.* After being paid a substantial portion of the contract price, DeReggi sought a mechanics lien against the property for labor and materials rendered in performance of the contract. *Id.* The circuit court subsequently

³ Glen Valley alleges that substantial compliance is an issue best suited for the finder of fact, whereas the Whangs argue that substantial compliance is properly decided by the court as a matter of law. We do not, however, answer this question as an absolute, but rather decide whether summary judgment is appropriate on a case by case basis. In making this determination, courts should be mindful that “[t]he summary judgment process is not properly an opportunity for the trial court to give credence to certain facts and refuse to credit others.” *Okwa v. Harper*, 360 Md. 161, 182 (2000). Therefore, where substantial compliance does not hinge on crediting some facts at the expense of others, summary judgment is appropriate.

granted Mate’s motion to dismiss on the grounds that Dereggi did not have an MC NHB license. *Id.*

In considering DeReggi’s appeal, we started with the common principal that “if a licensing statute is regulatory in nature, for the protection of the public, rather than merely to raise revenue, an unlicensed person will not be given the assistance of the courts in enforcing contracts that fall within the regulatory scheme.” *Id.* at 654 (citation omitted). Thereafter, we went on to acknowledge that strict compliance with the above-mentioned rule is not always appropriate, and “[a]t times, the statutory goals are best satisfied by allowing such contracts to be enforced.” *Id.* at 658. Thus, “substantial compliance” with the MC NHB licensing requirement would be sufficient to allow maintenance of a suit by a builder. *Id.* We therefore reversed and directed the circuit court to consider the following in deciding whether Dereggi had “substantially complied” with the licensing requirement:

The trial court should determine whether the purpose of the statute, to protect the public from unscrupulous and financially irresponsible contractors, has been met. In determining whether there was substantial compliance, courts in other jurisdictions have looked at a number of factors, including: (1) whether the contractor held a valid license at the time of contracting; (2) whether the contractor readily secured a license; and (3) the responsibility and competence of the contractor. *See Latipac*, 49 Cal.Rptr. 676, 411 P.2d at 568–70. Although “each factor need not be present . . . ‘the true test is whether the contractor’s substantial compliance with the licensing requirements satisfies the policy of the statute.’” *Capitol Indem.*, 900 P.2d at 1213 (quoting *Koehler v. Donnelly*, 114 N.M. 363, 838 P.2d 980, 982 (1992)).

In addressing these factors, we note that appellants did not have a license at the time the contract was executed. This factor weighs against a finding of substantial compliance. The court should, however, determine whether appellants knowingly ignored the licensure requirements. “If so, this is fatal to a claim of substantial compliance.” *Id.* at 1214. Additionally, the court

should consider whether appellants acted immediately to remedy their noncompliance upon receiving notice of the statutory violation.

Further, the court should consider whether appellees were prejudiced by appellants' failure to comply with the statute. *See id.* In doing so, the court should determine when appellees became aware of appellants' violation. If appellees continued to allow appellants to perform, and accepted appellants' performance pursuant to the contract with knowledge of the statutory violation, they will be deemed to have ratified the contract. *See McNairy*, 576 So.2d at 187-88.

Finally, in considering whether appellants were financially responsible contractors, the court should determine whether appellants "maintain[ed] ... liability insurance, surety bond, workers' compensation insurance, and any other requirement imposed" by law. *Capitol Indem.*, 900 P.2d at 1214. The existence of these safeguards weighs in favor of finding substantial compliance, as they show financial responsibility and offer protection to the public.

Id. at 661-62.

Subsequently, in 2009, this Court had the chance to re-examine the substantial compliance doctrine within the context of the MHIL. In *Baltimore Street Builders v. Stewart*, Baltimore Street Builders LLC ("BSB") had entered into a contract with Stewart, where Stewart would pay BSB for an addition to a building that Stewart owned. 186 Md. App. at 684. At the time of the execution of this contract, BSB did not possess an MHIL license and did not obtain one during the subsequent construction. *Id.* at 702. After Stewart failed to pay BSB approximately half of the price due under the contract, BSB sought a mechanics lien against the property in the circuit court. *Id.* at 686. In response, Stewart filed a motion to dismiss, or in the alternative, a motion for summary judgment alleging that BSB was unable to enforce the contract or establish a lien on the property because

BSB had no home improvement license required by the MHIL. *Id.* at 687. The circuit court granted that motion and BSB appealed. *Id.*

On appeal, we characterized BSB’s substantial compliance argument as follows: “at the time the contract with Stewart was signed, BSB was a partnership and Mr. Krunkel was one of BSB’s partners, and an entity controlled by Mr. Krunkel had a license.” *Id.* at 699. We first noted that such an attenuated relationship cannot be considered “substantial compliance in light of the requirement that the partnership [BSB] that contracts to do the home improvement work must be licensed.” *Id.* We also observed that the facts of *DeReggi* were in stark contrast with BSB’s claim, because the contractor in *DeReggi* obtained the required license “prior to starting work on the contract[,]” whereas BSB had not. *Id.* at 702.

We went on to discuss four cases cited in *Dereggi* to illustrate the scenarios where a party has substantially complied with a licensing statute.⁴ *Id.* at 702. We noted that the common feature in all of these cases is that “shortly after the contract at issue was signed, the contractor obtained a license, the defendant was not prejudiced, and the purpose of the statute was accomplished even though the contractor had not strictly complied with the dictates of the licensing law.” *Id.* at 704-05. Despite BSB’s failure to obtain a license at any point during construction, we went on to discuss whether BSB had fulfilled the statute’s purpose:

⁴ See *Jones v. Short*, 696 P.2d 665 (Alaska 1985); *Aesthetic Property Maintenance, Inc. v. Capitol Indemnity Corporation*, 183 Ariz. 74, 900 P.2d 1210, 1212 (1995); *McNairy v. Sugar Creek Resort, Inc.*, 576 So.2d 185 (Ala. 1991); *Murphy v. Campbell Investment Co.*, 79 Wash.2d 417, 486 P.2d 1080 (1971).

The purpose of the Maryland Home Improvement Law is, among other things, to protect homeowners from unskilled builders. That is the obvious reason for requiring an applicant for a license to pass a test and to have experience. *See* Md. Code Ann., (Bus. Reg.) sections 8–302 and 8-302.2. Another purpose is to make sure that contractors are financially responsible. *See* section 8–302.1 (requiring contractors to have at least \$50,000.00 in liability insurance). Also built into the law are remedies that the homeowner has against licensed contractors. Section 8–208 of the Home Improvement Law charges the Home Improvement Commission with the administration and enforcement of the statute and subtitle 3 Sections 8–301–8–317 authorize the commission to take remedial actions if there are violations of the licensing provisions. As pointed out in *Brzowski v. Maryland Home Improvement Commission*, 114 Md. App. at 628, 691 A.2d 699, provisions of the law governing the administration of the Home Improvement Guaranty Fund limit payments from the Fund to only those submitted by claimants who can establish that he or she has suffered actual loss due to the act or omission of a licensed contractor.

Because neither BSB nor Mr. Lenkey, who signed on behalf of BSB, had a home improvement license, Stewart was foreclosed from making a successful claim against either of them before the Home Improvement Commission, even though Stewart claims that the contractor was guilty of faulty workmanship. Nor does Stewart have any assurance that the person and/or entity he contracted with is financially sound. And, the mere fact that Stonehenge International, a sub contractor, was licensed does not fulfill the purpose of the Home Improvement Law insofar as Stewart is concerned. After all, Stewart never contracted with that entity and thus could not have successfully brought a breach contract action against Stonehenge.

Id. at 705-06. We ultimately held that BSB had failed to make a showing of substantial compliance with the MHIL. *Id.* at 706.

As the above cases illustrate, the focus of the substantial compliance determination is 1) whether the contractor had a license at the time of executing the contract or obtained licensing prior to performance of the contract, 2) whether the purpose of the licensing law – to protect homeowners from unskilled builders, to make sure contractors are financially responsible, and to provide special remedies not otherwise available to consumers – was

fulfilled, and 3) whether the consumer has been prejudiced by the contractor's failure to strictly adhere to the licensing requirements.

It is therefore necessary to examine these factors within the parameters of the construction contract to determine whether Glen Valley has substantially complied with the MHIL licensing requirement. However, before discussing these substantial compliance factors in the case at bar, we note that the circuit court below erred by failing to consider the effect that Mr. Friedman's personal involvement in the construction contract had on the fulfillment of the MHIL's legislative purpose. The circuit court's position that "Glen Valley cannot now ignore its own separate status and licensing obligations, and claim protection through Friedman's personal builder's license" may be relevant when considering whether or not Glen Valley has actually complied with the MHIL licensing scheme. See Part I, *supra*. However, when considering substantial compliance, *DeReggi* and *Baltimore Street Builders* illustrate that the licensing status of the contractor seeking enforcement of the contract is only one factor in the equation, with the focus also on the protections that were afforded to the consumer. We therefore consider the extent to which Mr. Friedman's involvement as a party to the present contract helped to fulfill the legislative purpose of the MHIL.⁵

⁵ The Whangs contend that Glen Valley failed to preserve this issue in the circuit court, but Glen Valley clearly raised this argument in response to the circuit court's concerns that Mr. Friedman was not the named plaintiff in the suit against the Whangs:

The Court: But I still keep getting back to the fact that Mr. Friedman is not the plaintiff here. Tell me why I shouldn't be worried about that.
(continued...)

a. Licensing status during execution and performance of the contract.

Moving to the first substantial compliance factor – whether the contractor had a license at the time of executing the contract or obtained licensing prior to performance of the contract – Glen Valley’s failure to maintain a license at the time may be relevant to the present dispute. As we noted in *Baltimore Street Builders*, one of the common facts in cases where the courts have found substantial compliance is the contractor’s receipt of the required license prior to beginning performance of the contract. *Id.* at 704-05.

Nonetheless, in *Baltimore Street Builders* we did not end our discussion of substantial compliance where we noted that BSB had not obtained the required license or attempted to do so. Rather, we discussed whether the purpose of the MHIL had been fulfilled and whether the consumers had experienced any prejudice resulting from BSB’s noncompliant licensing status.

b. Fulfillment of the legislative purpose of the MHIL.

As mentioned above, there are three legislative aims of the MHIL – to protect homeowners from unskilled builders, to make sure contractors are financially responsible, and to provide special remedies not otherwise available to consumers. We discuss the evidence pertaining to each of these factors in turn.

(...continued)

[Counsel for Glen Valley]: Because he is acting on behalf of the plaintiff as the builder. A, he is a co[-]signer of the contract. He is a guarantor of the contract. He also personally signed the contract and we submit that there’s nothing in the county code that says both contracting entities have to have a license in the county or have to have some other type of license. So that’s the – my answer to that is, he is already co[-]signing the document as part of a contracting party.

First, regarding the legislative purpose of protecting homeowners from unskilled builders, Glen Valley produced evidence that in order to receive the MC NHB license, Mr. Friedman submitted an application, various letters of reference from suppliers of construction material, and a summary of his experience in the construction industry. This summary included the following information: Mr. Friedman began working as a licensed builder with Montgomery County in the 1980's, he has completed many upper bracket homes, he voluntarily allowed his license to expire while working in other fields in the 1990's, and he has since been licensed as a contractor since 2001. Mr. Friedman's affidavit further alleged that all work done on the Whangs' home "was done properly and in a professional and workmanlike fashion," while the Whangs countered that the work was defective.

Second, regarding the legislative purpose of ensuring that builders are financially responsible, Glen Valley again produced evidence that in order for Mr. Friedman to obtain his MC NHB license, he submitted evidence of his finances to the Montgomery County Office of Consumer Protection ("MC OCP"). This evidence included credit references from suppliers of construction materials, and also a reference letter from First Union National Bank. Further, Glen Valley illustrated financial responsibility by submitting proof of liability insurance in excess of the requirements of the MHIL through a signed affidavit from Mr. Friedman. *See DeReggi*, 130 Md. App at 662 (instructing that in determining "whether appellants were financially responsible contractors, the court should determine whether appellants maintain[ed] ... liability insurance, surety bond, workers' compensation insurance, and any other requirement imposed by law.").

To counter the evidence of Mr. Friedman’s financial responsibility, the Whangs point out that the financial information required under the MHIL licensing scheme includes “proof of actual personal net worth, a credit report from a credit reporting agency, statements from bank accounts, and itemization of assets of the individual applying and any pending liens and judgments.” According to the Whangs, these required disclosures are much more stringent than those of the MC NHB licensing requirements which Mr. Friedman satisfied. The Whangs also produced evidence that Glen Valley’s charter was forfeited on two occasions for failure to file property returns, and allege for the first time on appeal that Mr. Friedman and Glen Valley have been sued in connection with the performance of other construction contracts.

Moving to the final purpose of the MHIL – the provision of administrative remedies to consumers – the Whangs alleged they would be unable to seek administrative remedies under either the Montgomery County or MHIL provisions.

Concerning administrative remedies under the Montgomery County licensing scheme, the circuit court ruled that the Whangs could not obtain redress through Montgomery County’s New Home Warranty Security Fund (MC NHSF) for any damages they sustained that might not be covered by insurance. The MC NHSF, “is designed to provide sufficient funds to pay claims by owners against builders who participate in the fund for any defect in new homes covered by the new home warranty.” Montgomery County Code § 31-C5. Mr. Friedman participates in the fund by virtue of his MC NHB license and the construction here may be considered “new construction” and thus eligible for protection under the NHSF. *See* Part III, *infra*. However, there was no evidence in the

record that the Whangs attempted to pursue any recourse through the MC NHSF. Accordingly, the circuit court erred in deciding as a matter of law that the Whangs would be unable to secure a remedy from this fund because there was no “new home warranty” included in the construction contract. *See* Montgomery County Code § 31-C5; *see also* Bus. Reg. § 8-405(a) (“[A]n owner may recover compensation from the [MHIL Home Improvement Guaranty Fund] for an actual loss that results from an act or omission by a *licensed contractor* or a violation of § 8-607(4) of this title as found by the Commission or a court of competent jurisdiction.”) (emphasis added); *see also* Bus. Reg. § 8-101(f) (defining “[l]icensed contractor” as a “person who is licensed by the [Maryland Home Improvement Commission] to act as a contractor.”). Therefore, the legislative aim of providing an administrative remedy remains to be seen in the present case.

c. Prejudice resulting from failure to obtain a contractor’s license.

The Whangs argue that they have been prejudiced by Glen Valley’s failure to obtain a MHIL license in two regards. First, as already discussed, they were unable to pursue administrative remedies. Second, the Whangs argue that because Glen Valley never sought licensure under the MHIL, Glen Valley’s financial responsibility has not been subject to scrutiny by the Home Improvement Commission.

In refuting the first point, Glen Valley argues that the Whangs’ complaint about administrative remedies is entirely hypothetical, as they did not pursue them. Further, claims against the MHIL fund are limited to \$20,000, “a miniscule sum” compared to the work performed in the present case.

In responding to the point of financial scrutiny, Glen Valley argues that there is no indication that the commission would have denied Glen Valley a MHIL license. Additionally, Glen Valley argues that when applying for a MHIL or MC NHB license, “the focus of the actual application process ... is on the individual and not his or her business organization.” Thus, the individual scrutiny of Mr. Friedman’s finances during his application for an MC NHB license is the functional equivalent of the financial scrutiny that Glen Valley would have undergone during its application process.

d. Material factual dispute regarding substantial compliance.

After review of the evidence on the above-mentioned substantial compliance factors, this Court holds that Glen Valley has, at the very least, created a material factual dispute concerning substantial compliance with the MHIL. As our decisions in *DeReggi* and *Baltimore Street Builders* illustrate, the legislative purpose of both the MC NHB and MHIL licensing requirement is essentially to protect consumers from unskilled and irresponsible contractors. *Compare DeReggi*, 130 Md. App at 661 (noting that the purpose of the Montgomery County licensing requirement is “to protect the public from unscrupulous and financially irresponsible contractors[.]”) with *Baltimore Street Builders*, 186 Md. App. at 704 (noting that the purpose of the MHIL licensing requirement is “to protect homeowners from unskilled builders” and “to make sure that contractors are financially responsible.”). By obtaining a MC NHB license, Mr. Friedman had to prove, to some extent, that he was both a skilled builder and financially responsible. Further, contrary to *Baltimore Street Builders* where we noted that there was no licensed contractor who was a party to the disputed contract, Mr. Friedman is a licensed contractor who has

agreed to perform the contractor's duties in the construction contract. Thus, Mr. Friedman's compliance with the MC NHB licensing requirement has generated a genuine dispute concerning substantial compliance.

On remand to the circuit court, the question of whether the Whangs pursued administrative remedies against Glen Valley, and the fact that Glen Valley may not possess a contractor's license could ultimately lead the fact finder to determine that there was a lack of substantial compliance. Nonetheless, it is inappropriate for a court to weigh and resolve these facts over others – such as the builder's experience and responsibility – in deciding to grant summary judgment. As we noted in *DeReggi*, “each factor need not be present ... ‘the true test is whether the contractor's substantial compliance with the licensing requirements satisfies the policy of the statute.’” 130 Md. App. at 661. Here, there is a material factual dispute over whether Mr. Friedman's involvement satisfies the policy of the statute. We therefore hold that the circuit court erred in granting summary judgment on the issue of Glen Valley's substantial compliance.

III. Did the circuit court err in holding that the construction on the Whangs' home was “home improvement” as opposed to “new construction?”

Glen Valley also alleges that the circuit court erred in holding that the construction at issue was home improvement, as opposed to new home construction. This point is relevant to the present dispute because “home improvement” is subject to the requirements of the MHIL, whereas “new home construction” is not. For the reasons that follow we hold that the circuit court was correct to find that the present contract was one for home improvement.

Under the MHIL, “home improvement” does not include “construction of a new home[]” or “work done to comply with a guarantee of a completion of a new building project[.]” Bus. Reg. § 8-101(g)(3). Instead, “home improvement” is defined as “*the addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building or part of a building that is used or designed to be used as a residence or dwelling place...*” Bus. Reg. § 8-101(g)(1)(i) (emphasis added).

Applying this definition to the undisputed facts of the present case, we hold that the construction contract meets the definition of “home improvement.” First, the Whangs’ home was complete when the construction began, as indicated by the description of the dwelling in the contract as a “4-level House” consisting of “approximately 17,000 square feet of *finish* [sic] living spaces[.]” This fact is confirmed by Mr. Friedman’s procurement of an occupancy permit for the existing house before selling it to the Whangs. Second, the construction was clearly an addition to the Whangs’ home. The plain wording of the construction contract identifies the agreement as one for the “construction of a custom home *addition*,” and as noted by the Whangs, “[t]he application for a building permit contains a box , labeled ‘*add*,’ which was checked off by the applicant Lewis Friedman, in lieu of other available options, including ‘construct,’ or ‘revision.’” (emphasis added).

Glen Valley alleges that there is a material factual dispute on this point because “the Montgomery County Department of Permitting Services define[s] ‘new construction’ as including any change to an existing building that expanded the existing footprint by one hundred percent or more.” Glen Valley alleges that the construction contract is “new construction” under this definition because the construction contract called for an

expansion of the existing home which more than doubled the homes square footage. While we do not dispute the application of the Montgomery County definition to the facts at hand, the definition of “home improvement” found in the MHIL is controlling in determining the MHIL’s application. Accordingly, we conclude that the circuit court correctly decided that the construction contract was “home improvement” subject to the licensing requirement of the MHIL.

IV. Did the circuit court err in disregarding evidence that the Whangs knew Glen Valley would utilize Mr. Friedman’s personal license in performing the contract?

In *DeReggi*, this Court remarked that whether the consumer was aware of a licensing impropriety yet continued to accept performance of the contract should be factored by the court as part of the substantial compliance determination. 130 Md. App. at 662. Glen Valley argues that “there is evidence in the record from which a fact finder could reasonably determine that the Whangs not only were aware that it was Mr. Friedman—not Glen Valley—that held the requisite license, but that they insisted that Mr. Friedman agree to perform the Construction Contract using his personal license.” In support of the argument that the Whangs were aware of the licensing impropriety, Glen Valley points to the fact that Mr. Friedman’s personal contractor’s license is included on the building permit application which Mr. Whang signed, and also that “Mr. Friedman’s [b]uilding [c]ontractor’s [l]icense [n]umber also was identified on the signature page of the

Construction Contract, which Mr. Whang drafted.” We hold that the resolution of this factual dispute is best left for the circuit court on remand.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.