FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-2306

JAMES DEMARIA,

Appellant,

v.

CONSTRUCTION INDUSTRY
LICENSING BOARD,

Appellee.

On appeal from the Construction Industry Licensing Board.
Aaron L. Boyette, Chairman.

March 22, 2023

TANENBAUM, J.

James DeMaria, a licensed contractor, seeks review of a final order of the Construction Industry Licensing Board (the "board"), awarding funds from the Florida Homeowners Construction Recovery Fund (the "recovery fund") to Theron and Toni Thayer. The award stems from an alleged failure by DeMaria's company to complete work on a pool that the Thayers supposedly paid for. Upon payment of that award, DeMaria's license will be suspended until he repays the recovery fund, so naturally he has a significant interest in challenging the board's order. Because the undisputed evidence in the record shows that the Thayers failed to obtain a judgment against the construction company and DeMaria, and

that there was no valid excuse for that failure, we set aside the board's award.

I

In 2004, the Thayers entered into a contract with DeMaria's company, Blue Stone Real Estate Construction and Development, to build a home in Crystal River, Florida. During the construction process, a dispute arose as to supposed improper change orders and payments on the contract. Ultimately, the Thayers filed a civil suit against Blue Stone in state circuit court. During the pendency of that case, Blue Stone filed for chapter 11 bankruptcy, and the civil case was stayed automatically. *See* 11 U.S.C. § 362(a)(1) (providing for an automatic stay of a judicial proceeding commenced against the debtor prior to the filing for bankruptcy).

There is no dispute that the Thayers did nothing in connection with the bankruptcy proceeding; that means they did not attempt to have the stay lifted so that they could continue their suit and obtain a judgment. The Thayers never secured a judgment against Blue Stone or DeMaria on their cause of action for damages based on the failure to complete work. Indeed, nothing else happened regarding their suit until 2014, when the circuit court acknowledged the bankruptcy stay and administratively closed the case. A final decree was entered in the bankruptcy matter in December 2015, effectively discharging the Thayers' cause of action; however, as unsecured creditors, they did not receive a disbursement. Shortly thereafter, the Thayers applied to the recovery fund. On May 29, 2020, the board's final order approving the Thayers' claim was rendered, awarding them $25,000, the maximum amount allowed. That brings us to this appeal.

II

Florida homeowners who contract for construction or home improvements, but are wronged by licensed contractors, can recover some of their losses from the recovery fund in certain circumstances. There is but one purpose behind the fund:

> to compensate an aggrieved claimant who contracted for the construction or improvement of the homeowner's residence located within this state and who has obtained

> a final judgment in a court of competent jurisdiction, was awarded restitution by the Construction Industry Licensing Board, or received an award in arbitration against a licensee on grounds of financial mismanagement or misconduct, abandoning a construction project, or making a false statement with respect to a project.

§ 489.1401(2), Fla. Stat.; *see also* § 489.141(1), Fla. Stat. (setting out conditions that must be satisfied by the claimant to eligible for recovery from the fund). The Legislature makes perfectly clear that a key criterion for recovery from the fund is that the amount of the claimant's damages has already been reduced to a civil judgment, arbitration award, or restitution order. *See* § 489.141(1)(a), (d), Fla. Stat. (requiring that the claimant receive a final judgment, arbitration award, or restitution order that "specifies the actual damages suffered as a consequence of such violation"); *cf. id.* (g) (requiring, as a condition of recovery, that "[a]ny amounts recovered by the claimant from the judgment debtor or licensee, or from any other source, have been applied to the damages awarded by the court or the amount of restitution ordered by the board").

The claimant, then, must put in some legwork *before* coming to the recovery fund. That is, the claimant must take reasonable steps to establish conclusively in an appropriate forum the facts showing an entitlement to damages and to recover his or her losses from all other available sources. For instance, the claimant first must "exhaust[] the limits of any available bond, cash bond, surety, guarantee, warranty, letter of credit, or policy of insurance." *Id.* (1). Even after obtaining the required judgment, arbitration award, or restitution order, the claimant still must show due diligence in collecting through execution or other defined means. *Id.* (1)(e). And the claimant then must apply "[a]ny amounts recovered . . . from the judgment debtor or licensee, or from any other source . . . to the damages awarded by the court or the amount of restitution ordered by the board." *Id.* (1)(g).

We see from these provisions that the statute is not written to allow a claim against the fund to serve as a substitute for an adjudication of facts by a court, arbitration panel, or licensing

board as to how much the contractor owes the claimant. The fund is supposed to be a last resort for a claimant to get paid on losses that already have been liquidated in another forum. There is, though, one pertinent exception to this requirement: when "the claimant has sought to have assets involving the transaction that gave rise to the claim removed from the bankruptcy proceedings so that the matter might be heard in a court of competent jurisdiction in this state," but, "*after due diligence*," nevertheless has been "precluded by action of the bankruptcy court from securing a final judgment against the licensee." § 489.141(1)(a)2., Fla. Stat. (emphasis supplied).* When faced with a claim travelling under this exception, the board itself (acting for the fund and not as a licensing authority) will have to adjudicate whether the claimant has shown both that he sought removal of the claim from bankruptcy *and* that he put the effort in to get a final judgment from a court, even if there were no assets to cover the judgment.

In its final order, the board concluded that the Thayers were "qualified to make a claim for recovery from the Recovery Fund pursuant to section 489.1401(2), Florida Statutes." We just quoted subsection two of the statute three paragraphs above, which simply states the Legislature's intent that there be a final judgment, arbitration award, or restitution order. While the board's final order also references section 489.141(1), it remarks only that each of the conditions enumerated in subsections (1)(a)-(h) must be met. The final order fails to conclude that the Thayers either satisfied subsection (1)(a) or met the requirements for waiver, and it fails to recite any evidence that the board could have relied upon in reaching either conclusion. The order instead merely mentions that a final bankruptcy decree was entered that

* The only other exception to the statutory requirement that there be judicial or quasi-judicial liquidation of damages is for when the claimant is foreclosed from obtaining a judgment by the death of the licensee. *See id.* (1)(a)1. Taken together, these two narrow exceptions highlight the near-absolute necessity that the claimant's damages be adjudicated elsewhere, before the claimant comes to the fund.

extinguished the Thayers' "unsecured claim that had been raised by them against [Blue Stone]" in circuit court.

We do not need to explore in depth the meaning of the verb clause "sought to have assets involving the transaction that gave rise to the claim removed from the bankruptcy proceedings" as it is used in the statute. *But cf.* 11 U.S.C. § 541 (defining property of the bankruptcy estate). Even if we assume that the clause includes an attempt to obtain an order permitting the claimant's state court suit to continue against the debtor, there is no doubt that the Thayers did not do this. In fact, they did nothing at all while the bankruptcy proceeding continued; they let their state court suit just sit dormant. The board nevertheless argues on appeal that it did not err because regardless of whether the Thayers sought to remove assets from Blue Stone's bankruptcy action, they were not going to recover any funds, as they were two of several unsecured creditors. According to the board, because any attempt to remove assets from the bankruptcy proceeding would have been fruitless, this court should exempt the Thayers from the statutory requirement. That is not a correct reading of the statute.

The waiver provision does not contemplate the board's consideration of whether obtaining a judgment against a bankruptcy debtor would be fruitless based on an inability to satisfy any part of that judgment before discharge of the debt. That is not a relevant question. As we already highlighted, what *is* relevant is whether the claimant exercised "due diligence" to obtain that judgment in the first place, before coming to the board without one in hand. *See* § 489.141(1)(a)2., Fla. Stat. To take advantage of the excusal from the judgment requirement found in subparagraph (1)(a)2., the claimant must prove to the board that he first had made every reasonable effort to have the claimed damages conclusively adjudicated in the proper forum and was "precluded by action of the bankruptcy court from securing" that adjudication. If the board, faced with a claim that relies on this exception, then fails to make a finding that is supported by the evidence presented to it and hews to the text of subparagraph (1)(a)2., the board is without any authority to adjudicate the amount of the Thayers' loss on its own.

What does this mean here? It means that the Thayers had to show that they engaged in the bankruptcy proceedings as a creditor and utilized the bankruptcy procedures to seek relief from the automatic stay that precluded them from continuing with their circuit court suit and obtaining a judgment. *See* 11 U.S.C. § 362(d)(1); *cf.* 28 U.S.C. § 1334(c)(2). Notably, that relief from the stay could have been conditioned on the understanding that the judgment itself, if obtained, would still be subject to the stay. *See* 11 U.S.C. § 362(d); *cf. id.* (a)(2). Under federal bankruptcy law, then, there were steps that the Thayers could have taken to obtain the final judgment they needed to recover from the fund. The pendency of a bankruptcy proceeding, which concluded with a decree that discharged the Thayers' state court claim, by itself is not enough to excuse the Thayers' failure to obtain the necessary final judgment. Instead, the Thayers sat on their hands, with their circuit court suit against DeMaria's company on ice, while the bankruptcy proceeding continued. That is the opposite of diligence. The lack of proof of any diligence by the Thayers (and the commensurate lack of a proper board finding on this pertinent question) left the board, acting for the fund, without authority to excuse the absence of a judgment and determine for itself what the Thayers' "actual damages suffered" were.

At bottom, the board's final order granting the Thayers an award out of the recovery fund—in the absence of a civil judgment, arbitration award, or restitution order—was rendered without statutory authorization. The Legislature allows us to set aside agency action when the agency "has erroneously interpreted a provision of law and a correct interpretation compels a particular action," and also when the "agency's exercise of discretion was . . . [o]utside the range of discretion delegated to the agency by law" or "[o]therwise in violation of a constitutional or statutory provision." § 120.68(7)(d), (e), Fla. Stat. We do so here.

The order awarding the Thayers a recovery from the fund is SET ASIDE.

WINOKUR and NORDBY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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