

**BEFORE THE MARYLAND REAL ESTATE COMMISSION**

**IN THE MATTER OF THE CLAIM  
OF MARTIN LEVY,  
CLAIMANT**

**v.**

**THE MARYLAND REAL  
ESTATE COMMISSION  
GUARANTY FUND FOR THE  
ALLEGED MISCONDUCT OF  
DAVID HERBST, RESPONDENT**

**CASE NO. 2019-RE-225**

**OAH NO. DLR-REC-22-19-03985**

\* \* \* \* \*

**PROPOSED ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated July 16, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 21<sup>st</sup> day of August, 2019, hereby **ORDERED**:

A. That the Findings of Fact in the recommended decision be, and hereby are **AFFIRMED**.<sup>1</sup>

B. That the Conclusions of Law in the recommended decision be, and hereby are, **APPROVED**.

C. That the Recommended Order in the recommended decision be, and hereby is, **ADOPTED** and **AMENDED** as follows:

**ORDERED** that once this Proposed Order becomes a Final Order and all

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<sup>1</sup> The Commission notes the following harmless typographical error requiring correction for clarity only:

- The property at issue is **10300** (not 13000) Coastal Highway, Unit 1101, Ocean City, Maryland.
- On pages 2-3 of the recommended decision the ALJ identifies exhibits including:
  - GF Ex.2, the Hearing Order, which is dated January 28, 2019, not February 1, 2019;
  - GF Ex. 3, Respondent's licensing history, which is dated April 22, 2019, not March 14, 2019;
  - GF Ex.4, the Complaint, which is dated October 11, 2018, not September 12, 2018;
  - Cl. Ex. 1, the Affidavit of Brooke Mumford, which is dated March 13, 2019, no March 13, 119; and
  - Resp. Ex. 1, letter from Respondent's brother and sister-in-law, which is dated April 24, 2019, not April 22, 2019.

rights to appeal are exhausted, the Claimant, **Martin Levy**, be reimbursed from the Maryland Real Estate Guaranty Fund in the amount of **Four Thousand Two Hundred Fifty Dollars (\$4,250.00)**;

**ORDERED** that all real estate licenses held by the Respondent, **David Herbst**, shall be suspended from the date this Proposed Order becomes a Final Order and all rights to appeal are exhausted and shall not be reinstated until the Maryland Real Estate Guaranty Fund is reimbursed, including any interest that is payable under the law and application for reinstatement is made;

D. That the records, files, and documents of the Maryland Real Estate Commission reflect this decision.

E. Pursuant to Annotated Code of Maryland, State Government Article § 10-220, the Commission finds that the recommended decision of the Administrative Law Judge required modification because it omitted from the Recommended Order that Respondent's license be suspend until the Maryland Real Estate Guaranty Fund (and any interest) is repaid and included minor typographical errors.

F. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.09 those parties adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of the Order to file written exceptions to this Proposed Order. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202. If no written exceptions are filed within the twenty (20) day period, then this Proposed Order becomes final.

G. Once the Proposed Order becomes final, the parties have an additional thirty (30) days in which to file an appeal to the Circuit Court for the Maryland County in which the Appellant

resides or has his/her principal place of business, or in the Circuit Court for Baltimore City.

August 21, 2019

Date

MARYLAND REAL ESTATE COMMISSION

**SIGNATURE ON FILE**

By: \_\_\_\_\_

SIGNATURE ON FILE

IN THE MATTER OF THE CLAIM  
OF MARTIN LEVY,  
CLAIMANT

v.

THE MARYLAND REAL ESTATE  
COMMISSION GUARANTY FUND  
FOR THE ALLEGED MISCONDUCT  
OF DAVID HERBST,  
REAL ESTATE BROKER,  
RESPONDENT

\* BEFORE LORRAINE E. FRASER,  
\* ADMINISTRATIVE LAW JUDGE,  
\* THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH CASE No. DLR-REC-22-19-03985  
\* REC COMPLAINT No. 19-RE-225  
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**RECOMMENDED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On October 11, 2018, Martin Levy (Claimant) filed a claim against the Maryland Real Estate Commission (REC) Guaranty Fund (Fund) for \$5,000.00<sup>1</sup> for monetary losses allegedly incurred by the Claimant as a result of the misconduct of David Herbst (Respondent), a licensed real estate broker, in providing property management services to the Claimant for real property located at 13000 Coastal Highway, Unit 1101, Ocean City, Maryland (the Property).

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<sup>1</sup> The Claimant amended this amount at the hearing, as discussed below.

On January 28, 2019, the REC issued an Order for Hearing. On February 4, 2019, the REC transmitted the matter to the Office of Administrative Hearings (OAH) for a hearing on the Claimant's claim against the Fund.

On April 24, 2019, I conducted a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2018). The Claimant represented himself. The Respondent represented himself. Nicholas Sokolow, Assistant Attorney General for the Department of Labor, Licensing and Regulation (DLLR), represented the Fund.

The Administrative Procedure Act, the procedural regulations of the DLLR, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); Code of Maryland Regulations (COMAR) 09.01.02, 09.01.03, 09.11.03.02; and COMAR 28.02.01.

### **ISSUES**

The issues are whether the Claimant sustained an actual loss as a result of an act or omission of the Respondent that constitutes theft, embezzlement, false pretenses, forgery, misrepresentation, or fraud; and, if so, the amount of the loss.

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits into evidence on behalf of the Fund:

- GF Ex. 1 Notice of Hearing, 2/13/19
- GF Ex. 2 Hearing Order, 2/1/19
- GF Ex. 3 The Respondent's licensing history, 3/14/19
- GF Ex. 4 Complaint, 9/12/18
- GF Ex. 5 Rental agreement between the Claimant and the Respondent, 10/7/15

I admitted the following exhibit into evidence on behalf of the Claimant:

Cl. Ex. 1 Affidavit of Brooke Mumford, 3/13/119

I admitted the following exhibits into evidence on behalf of the Respondent:

Resp. Ex. 1 Letter from the Respondent's brother and sister-in-law, 4/22/19

Resp. Ex. 2 Medical information from Anna T. Monias, M.D., Gilchrist Greater Living at Broadmead

Resp. Ex. 3 Medical information from Anna T. Monias, M.D., Greater Baltimore Medical Center

Resp. Ex. 4 Sinai Driving Evaluation and Training Program Recommendations and Follow up, 2/4/19

Resp. Ex. 5 Driver's License Suspension, 2/8/19

Resp. Ex. 6 Reporting Officer Narrative, Ocean City Police Department, 9/10/18; Case Supplemental Reports, 11/21/18 and 12/20/18

Resp. Ex. 7 Notice of foreclosure sale of the Respondent's property located at 7802 Coastal Highway, Ocean City, Maryland, 21842

Resp. Ex. 8 Notice of Intent to Foreclose on the Respondent's property located at 7804 Coastal Highway, Ocean City, Maryland, 21842

### Testimony

The Claimant testified.

The Respondent testified.

The Fund presented no testimony.

### **FINDINGS OF FACT**

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

1. The Claimant is the owner of the Property, a condominium unit located in Ocean City, Maryland.

2. At all times relevant to this case, the Respondent was a licensed real estate broker who provided property management services, handling the rentals of condominium units in Ocean City, Maryland.

3. Sometime in the fall of 2017 or winter of 2018, the Claimant and the Respondent entered into a rental agreement for the Respondent to act as the exclusive rental agent for the Claimant.

4. Under the agreement, the Respondent collected rental payments and deposits from tenants on behalf of the Claimant. The Claimant paid the Respondent 15% of the gross rental for weekly rentals the Respondent obtained.

5. The Respondent obtained a tenant and collected rent for four weeks from August 3 through September 1, 2018 on behalf of the Claimant.

6. The Claimant charged \$5,000.00 for the four weeks from August 3 through September 1, 2018.

7. After subtracting the Respondent's 15% commission, the Claimant should have received \$4,250.00 for the rental ( $\$5,000.00 \times .85 = \$4,250.00$ ).

8. The Respondent did not pay any money to the Claimant.

9. The Respondent owes the Claimant \$4,250.00.

### **DISCUSSION**

The burden of proof at a hearing on a claim against the Fund is on the "claimant to establish the validity of the claim." Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2018). Section 17-404 of the Business Occupations & Professions article governs all claims brought against the Fund and sets forth the following criteria that must be established by a claimant to obtain an award:

(a)(1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.



- (2) A claim shall:
- (i) be based on an act or omission that occurs in the provision of real estate brokerage services by:
    - 1. a licensed real estate broker;
    - 2. a licensed associate real estate broker;
    - 3. a licensed real estate salesperson; or
    - 4. an unlicensed employee of a licensed real estate broker;
  - (ii) involve a transaction that relates to real estate that is located in the State; and
  - (iii) be based on an act or omission:
    - 1. in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or
    - 2. that constitutes fraud or misrepresentation.

(b) The amount recovered for any claim against the Guaranty Fund may not exceed \$50,000 for each claim.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a), (b) (2018). *See also* COMAR 09.11.01.14.

The Claimant in this case testified and submitted documents showing that the Property was rented through the Respondent during the weeks of August 3 through September 1, 2018. The Claimant also submitted evidence showing the total amount he was owed. The evidence shows the Respondent owes the Claimant \$4,250.00.

The Respondent testified that he had a number of strokes that affected his memory and now has dementia. He submitted documentation regarding his medical condition. He stated that he did not intentionally take money from his customers and apologized. However, he could not explain what happened to the money he owed the Claimant. Further, the Respondent has not paid the Claimant the money he owes him as of the date of the hearing.

The Fund argued that the Respondent agreed to collect money on behalf of the Claimant and disburse those funds to the Claimant but that he failed to do so. The Fund maintained that the Respondent's failure to disburse all the funds collected to the Claimant constituted a misrepresentation. The Fund recommended an award to the Claimant of \$4,250.00.

Therefore, I find the Claimant is entitled to an award from the Fund in the amount of \$4,250.00 for his actual loss based on the Respondent's misrepresentation in the provision of real estate services.

**CONCLUSIONS OF LAW**

Based on the above Findings of Fact and Discussion, I conclude as a matter of law that the Claimant sustained an actual loss compensable by the Fund due to an act or omission of the Respondent in which money was obtained on behalf of the Claimant but not remitted in full to the Claimant, which constitutes misrepresentation in the provision of real estate services. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2) (2018). I further conclude as a matter of law that the Claimant is entitled to receive an award from the Fund in the amount of \$4,250.00. *Id.*; COMAR 09.11.01.14.

**RECOMMENDED ORDER**

I PROPOSE that the Claim filed by the Claimant against the Maryland Real Estate Guaranty Fund be GRANTED in the amount of \$4,250.00.

**SIGNATURE ON FILE**

July 16, 2019  
Date Decision Issued

\_\_\_\_\_  
Lorraine E. Fraser  
Administrative Law Judge

LEF/kdp  
# 181042

SIGNATURE ON FILE