

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**IN THE MATTER OF THE CLAIM
OF KEVIN AND PAM O'MEARA,
CLAIMANT**

v.

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

CASE NO. 2019-RE-239

OAH NO. DLR-REC-22-19-03990

* * * * *

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 21st day of August, 2019, hereby **ORDERED:**

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

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 rights to appeal are exhausted, the Claimant, **Kevin and Pam O'Meara**, be

¹ The Commission notes the following harmless typographical errors requiring correction for clarity only:

- On pages 2-3 of the recommended decision the ALJ identifies exhibits including:
 - GF Ex. 3, Respondent's licensing history, which is dated April 22, 2019, not March 14, 2019; and
 - Resp. Ex. 1, letter from Respondent's brother and sister-in-law, which is dated April 24, 2019, not April 22, 2019.

reimbursed from the Maryland Real Estate Guaranty Fund in the amount of **Five Thousand Five Hundred Twenty Nine Dollars and Fifty Cents (\$5,529.50)**;

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

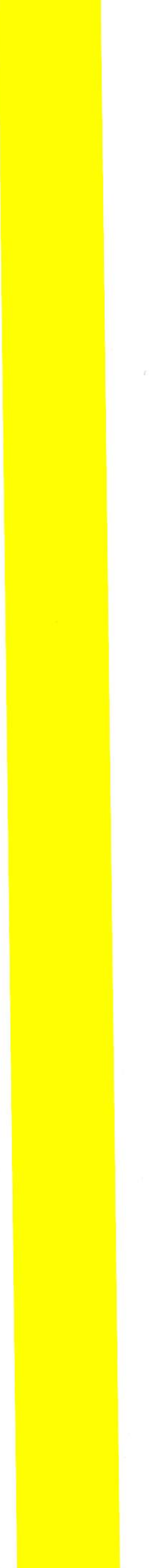
MARYLAND REAL ESTATE COMMISSION

SIGNATURE ON FILE

By: _____

SIGNATURE ON FILE

[Faint handwritten signature]



IN THE MATTER OF THE CLAIM
OF KEVIN & PAM O'MEARA,
CLAIMANTS

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-22-19-03990
* REC COMPLAINT No. 19-RE-239
*
*
*
*
*

* * * * *

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 November 14, 2018, Kevin and Pam O'Meara (Claimants) filed a claim against the Maryland Real Estate Commission (REC) Guaranty Fund (Fund) for \$9,165.41¹ for monetary losses allegedly incurred by the Claimants as a result of the misconduct of David Herbst (Respondent), a licensed real estate broker, in providing property management services to the Claimants for real property located at 7005 Atlantic Avenue, Unit 2S, Ocean City, Maryland (the Property).

¹ The Claimants modified this amount during 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 Claimants' 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 Claimants represented themselves. 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 Claimants 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, 1/28/19
- GF Ex. 3 The Respondent's licensing history, 3/14/19
- GF Ex. 4 Complaint, 11/14/18

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

- Cl. Ex. 1 Supplemental Addendum written by the Claimants

- Cl. Ex. 2 Statement from the Respondent, 2/28/18
- Cl. Ex. 3 Check from the Respondent to the Claimants for \$560.00, 2/5/18
- Cl. Ex. 4 Statement from the Respondent, 5/18/18
- Cl. Ex. 5 Check from the Respondent to the Claimants for \$560.00, 5/18/18
- Cl. Ex. 6 Statement from the Respondent, 6/10/18
- Cl. Ex. 7 Check from the Respondent to the Claimants for \$340.50, 6/10/18
- Cl. Ex. 8 Statement from the Respondent, 7/10/18
- Cl. Ex. 9 Check from the Respondent to the Claimants for \$1,300.00, 7/10/18
- Cl. Ex. 10 Check from the Respondent to the Claimants for \$3,129.41, 8/1/18; returned for insufficient funds, 9/4/18; \$12.00 return items fee
- Cl. Ex. 11 List of the Claimants' August and September 2018 rentals, gross rent, and payments received from Bud Church Realty

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 Claimants 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 Claimants are the owners 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. Every year since 2002, the Claimants and the Respondent entered into a rental agreement for the Respondent to act as the exclusive rental agent for the Claimants.
4. Under the agreement, the Respondent collected rental payments and deposits from tenants on behalf of the Claimants. The Claimants paid the Respondent 15% of the gross rental for weekly rentals the Respondent obtained.
5. The Respondent obtained tenants and collected rent for the following weeks on behalf of the Claimants: one week in June 2018, three weeks in July 2018, three weeks in August 2018, and one week in September 2018.
6. The Claimants charged \$1,000.00 for the one week in June 2018; \$3,500.00 for the three weeks in July 2018; \$4,800.00 for the three weeks in August 2018; and \$1,000.00 for the one week in September 2018. The total rental fees were \$10,300.00.
7. The Claimants owed the Respondent \$477.00 for six cleanings of the Property.

8. After subtracting the Respondent's 15% commissions and the cleanings, the Claimants should have received \$8,278.00 for the rentals ($\$10,300.00 \times .85 = \$8,755.00 - \$477.00 = \$8,278.00$).

9. The Respondent remitted \$2,760.50 to the Claimants.

10. The Respondent still owes the Claimants \$5,517.50 ($\$8,278.00 - \$2,760.50 = \$5,517.50$) for the rentals.

11. The Respondent sent the Claimants a check in August 2018, which was returned by the Claimants' bank for insufficient funds. The Claimants' bank charged \$12.00 for the returned check.

12. The Respondent owes the Claimants a total of \$5,529.50 ($\$5,517.50 + \$12.00 = \$5,529.50$).

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 Claimants in this case testified and submitted documents showing that the Property was rented through the Respondent during one week in June 2018, three weeks in July 2018, three weeks in August 2018, and one week in September 2018. The Claimants also submitted evidence showing the total amount they were owed and the partial payments they received from the Respondent. In addition, the Claimants submitted the notice from their bank showing the check from the Respondent that was returned for insufficient funds. The evidence shows the Respondent owes the Claimants \$5,529.50.

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 Claimants. Further, the Respondent has not paid the Claimants the money he owes them as of the date of the hearing.

The Fund argued that the Respondent agreed to collect money on behalf of the Claimants and disburse those funds to the Claimants, but that he failed to do so. The Fund maintained that the Respondent's failure to disburse all the funds collected to the Claimants constituted a misrepresentation. The Fund recommended an award to the Claimants of \$5,517.50.²

² The Fund suggested the \$12.00 returned check fee not be included in the award. I disagree because the returned check fee is directly related to the Respondent's failure to pay the Claimants the rental money he collected. The Respondent failed to maintain the Claimants' funds in his account; these were funds he held in trust for them.

Therefore, I find the Claimants are entitled to an award from the Fund in the amount of \$5,529.50 for their 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 Claimants 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 Claimants, but not remitted in full to the Claimants, 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 Claimants are entitled to receive an award from the Fund in the amount of \$5,529.50. *Id.*; COMAR 09.11.01.14.

RECOMMENDED ORDER

I PROPOSE that the claim filed by the Claimants against the Maryland Real Estate Guaranty Fund be GRANTED in the amount of \$5,529.50.

July 16, 2019
Date Decision Issued

LEF/kdp
181043

SIGNATURE ON FILE

Lorraine E. Fraser
Administrative Law Judge