

BEFORE THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM *
OF ROBERT MCNAMARA *
AGAINST THE MARYLAND REAL * CASE NO. 2012-RE-080
ESTATE GUARANTY FUND, * OAH NO. DLR-REC-22-12-12475
FOR THE ALLEGED MISCONDUCT *
OF SUE ANN WILLISON *

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law, and Recommended Order of the Administrative Law Judge dated August 20, 2012, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 18th day of October, 2012

ORDERED,

- A. That the Findings of Fact in the recommended decision be, and hereby are, ADOPTED;
- B. That the Conclusions of Law in the recommended decision be, and hereby are, ADOPTED;
- C. That the Recommended Order be, and hereby is, AMENDED as follows:

ORDERED that the Claim of Robert McNamara against the Maryland Real Estate Guaranty Fund based on the actions of Sue Ann Willison is granted in the amount of \$3,060.00;

ORDERED that Sue Ann Willison shall be ineligible to hold a real estate license until the Fund is repaid in full together with interest as provided by law;

ORDERED that the records and publications of the Maryland Real Estate Commission reflect this decision.

D. Pursuant to §10-220 of the State Government Article, the Commission finds the recommended order had to be amended to reduce the amount of the award from the Guaranty Fund. The Administrative Law Judge ("ALJ") allowed the Claimant to recover the amount that he paid the Respondent for providing property management services for the month when she failed to remit the rental payment to the Claimant. The ALJ reasons that because the Respondent was not acting according to the terms of the Property Management Agreement, she was not entitled to be paid in accordance with the Agreement. COMAR 09.11.01.18 provides that a claimant is entitled to recover only actual monetary loss. This may not include "commissions owed to a licensee of this Commission acting in his capacity as either a principal or agent in a real estate transaction." Based on this provision, the Claimant is not entitled to recover the \$240 payable to the Respondent under the Agreement.

E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.08 those parties adversely affected by this Proposed Order shall have 20 days from the postmark date of the Order to file exceptions and to request to present arguments on the proposed decision before this Commission. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor,

500 North Calvert Street, Baltimore, MD 21202.

SIGNATURE ON FILE

Maryland Real Estate Commission

IN THE MATTER OF THE CLAIM OF:	*	BEFORE A. J. NOVOTNY, JR.,
ROBERT MCNAMARA	*	AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	*	OF THE MARYLAND OFFICE
v.	*	OF ADMINISTRATIVE HEARINGS
THE MARYLAND REAL ESTATE	*	OAH CASE No. DLR-REC-22-12-12475
COMMISSION GUARANTY FUND	*	MREC COMPLAINT No. 12-RE-080
FOR THE ALLEGED MISCONDUCT OF	*	
SUE ANNE WILLISON, REAL ESTATE	*	
SALESPERSON,	*	
RESPONDENT	*	

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On September 6, 2011, Robert McNamara (Claimant) filed a claim against the Maryland Real Estate Commission Guaranty Fund (Fund) for \$3,300.00. The claim was for monetary losses allegedly incurred by the Claimant as a result of the misconduct of Sue Willison, Licensed Real Estate Salesperson (Respondent) in business as West Patrick Property Solutions, LLC, (West Patrick) located in Frederick, Maryland.

On March 7, 2012 the Maryland Real Estate Commission (MREC) transmitted the matter to the Office of Administrative Hearings (OAH) for a hearing concerning the Claimant's claim

against the Fund. On April 11, 2012, the OAH scheduled a hearing for May 29, 2012 at the OAH's Wheaton Maryland facility.

On May 29, 2012, after determining that proper notice was provided¹ to the Respondent, I conducted the hearing as scheduled. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2010). The Claimant was present and represented himself. Kris King, Assistant Attorney General for the Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Respondent was not present.²

The Administrative Procedure Act, the procedural regulations of the DLLR, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2011); Code of Maryland Regulations (COMAR) 09.01.02, 09.01.03, 09.11.03.02; and 28.02.01.

ISSUES

(1) Did the Claimant sustain an actual loss as a result of an act or omission of the Respondent that constitutes theft, embezzlement, false pretenses, forgery, misrepresentation, or fraud?

(2) If the Claimant sustained an actual loss, what is the amount of actual loss compensable by the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

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

Fund Ex. 1 Notice of Hearing, dated April 11, 2012 with attachments

¹ The OAH notice sent via regular mail to the Respondent at her address of record was not returned by postal authorities. The notice mailed by registered, return receipt mail showed delivery to someone at the Respondent's address of record on April 18, 2012.

² Based upon the MREC Consent Order signed by the Respondent on November 11, 2011, the Respondent will not contest any claims filed against her with the Fund. See Fund Ex. 5.

- Fund Ex. 2 Order for Hearing, signed March 7, 2012
- Fund Ex. 3 Computerized record of licensing and address information for the Respondent, dated May 25, 2012
- Fund Ex. 4 Affidavit of MREC Assistant Director Steven Long attesting to Motor Vehicle Administration verification of Respondent's current address
- Fund Ex. 5 November 22, 2011 Investigative report of Jack Mull, Jr., MREC investigator, with attachments including the Fund claim and MREC Consent Order

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

- Claimant Ex. 1 Copy of Claimant's Fund claim with attachments including the Management Agreement signed October 8, 2010.
- Claimant Ex. 2 Claimant's Bank Deposit Summary/accounting sheet with entries January 13, 2001 through December 6, 2011
- Claimant Ex. 3 Email and response from Claimant to Respondent, initiated July 12, 2011
- Claimant Ex. 4 Copies of Claimant's checks numbered 1179 and 1180, both dated November 1, 2010
- Claimant Ex. 5 Copy of tenant's check number 1190 issued to West Patrick, dated June 20, 2011
- Claimant Ex. 6 West Patrick "Detailed Owner's Statement" for November 1, 2010 through December 16, 2010

No exhibits were offered by the Respondent.

Testimony

The Claimant and Jack Mull, Jr., MREC investigator, testified.

FINDINGS OF FACT

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

1. At all times relevant to this matter, the Respondent was a licensed real estate salesperson, license number 3894619. Her license was due to expire on September 9, 2013 but it was revoked by the MREC on November 11, 2011.

2. The Claimant is the owner of a house located at 547 Chestertown Street, Gaithersburg Maryland, 20878 (Property). It is a rental property.

3. On October 8, 2010, the Claimant entered into a Property Management and Exclusive Rental Agreement (Agreement) with the Respondent and West Patrick in which the Respondent would be the Claimant's leasing and property manager for the Property. Along with managing the property, the Respondent would be given a maintenance trust account of \$300.00 provided by the Claimant, and renewed as necessary, for minor repairs and maintenance of the Property. The Respondent would also collect the monthly rent from the tenant, which was to be forwarded to the Claimant. The Respondent was paid \$240.00, from the rent collected, as her monthly compensation.

4. On or about October 10, 2010, the Property was rented to Patricia Block (Tenant) for \$3000.00 monthly and the Respondent was to manage the property according to the Agreement.

5. The Tenant paid the rent to the Respondent and the Respondent managed the Property substantially according to the lease and Agreement until July, 2011 when, although the Tenant paid the July rent of \$3000.00 to the Respondent, and the Respondent received it and deposited it in her bank account, the Respondent never remitted any part of the July rent to the Claimant.

6. After the Respondent failed to remit the July rental payment that she received to the Claimant, following his email request for payment in July 2011, the Claimant advised the Respondent that she was in breach of the Agreement and that it was terminated.

7. The Respondent has never remitted the July rent (\$3000.00) that she received from the Tenant to the Claimant, nor has the Respondent returned the \$300.00 from the management trust account that she had for maintenance of the Property.

DISCUSSION

On April 11, 2012, the OAH mailed notices of the hearing to the Respondent by certified and regular mail to her active address as listed with the Maryland Motor Vehicle Administration, which is her last address on file with the MREC, albeit the Respondent's MREC issued salesperson's license had been revoked on November 11, 2011. However, those notices were not returned as undeliverable by postal authorities and someone, whose name appeared to be Matt Reid, "Agent," accepted the registered mail at the Respondent's address of record. The notices advised the Respondent of the date, time, and place of the hearing. Thus, I conclude that notice of the scheduled hearing was properly provided to the Respondent. Although the Respondent did not appear at the hearing to contest the Claimant's claim, whether by her choice or pursuant to the MREC Consent Order, 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) (2010).

Section 17-404(a) governs claims brought against the Fund and sets forth, in pertinent part, the following criteria that must be established by a claimant to obtain an award:

§ 17-404. Claims against Guaranty Fund.

(a) *In general.*-(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) *Limitation on recovery.* - The amount recovered for any claim against the Guaranty Fund may not exceed \$25,000 for each claim.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a), (b) (2010). *See also* COMAR 09.11.03.04.

The MREC shall order payment of a valid claim from the Guaranty Fund for actual monetary losses suffered by a claimant not to exceed \$25,000. Md. Code Ann., Bus. Occ. & Prof. § 17-410(a), (b) (2010); COMAR 09.11.01.18.

It is undisputed that the Respondent was a licensed salesperson involved in a transaction (i.e. the Agreement) relating to real estate (the Property) located in this state. Thus the claim meets the first two of the three parts of the law necessary to recover a claim against the Fund.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(1) and (2)(i)&(ii) (2010).

The Respondent acted in her professional capacity as property manager according to the Agreement with the Claimant for several months. Then, with the payment of the July 2011 rent, the Respondent accepted the \$3000.00 July rental payment but kept it rather than forwarding it to the Claimant as she was supposed to do according to the Agreement.

I find that the Respondent's accepting the \$3000.00 July rental payment and then failing to remit it to the Claimant and, once the Agreement was cancelled, her failure to return the \$300.00 maintenance trust account, to which she was no longer entitled, without a legitimate basis, constitutes an act of obtaining money by embezzlement, false pretenses and/or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (2010). Thus the claim meets the third part of the three parts of the law necessary to recover a claim against the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(1) and (2)(i)&(ii) (2010).

Although the Fund does not dispute the claim generally, the Fund argues that the Claimant should only be entitled to \$3,060.00 rather than his claimed \$3,300.00. The Fund argues that although the Claimant seeks \$3,000.00, being the July 2011 rental payment that he did not receive, plus the \$300.00 maintenance trust account that was not returned (totaling the claim of \$3,300.00) the Respondent's fee of \$240.00 monthly should be deducted. The Fund's position is that, setting aside the \$300.00 maintenance trust account, had the Respondent not failed to perform according to the Agreement, the most money that the Claimant would have been entitled to from the July 2011 rent of \$3,000.00, even if the contract was cancelled in July 2011, was \$2,760.00 ($\$3,000.00 - \$240 \text{ fees} = \$2,760.00$). Then, adding back the return of the \$300.00 maintenance trust account, the Claimant would have been entitled to only \$3,060.00 ($\$2,760.00 + \$300.00 = \$3,060.00$).

The Fund relies on COMAR 09.11.01.18 to substantiate the \$240.00 reduction of the otherwise undisputed claim. The recovery from the fund shall be "restricted to the actual monetary loss incurred by the claimant, but may not include monetary losses other than the monetary loss from the originating transaction." COMAR 09.11.01.18.

I disagree with the Fund's argument. According to the Agreement, the Respondent was entitled to \$240.00 monthly as her compensation for *performing* the duties of the Agreement. For July, 2011, when the Respondent took the full rental payment of \$3,000.00, and failed to remit any of it to the Claimant, the Respondent was then not acting according to the terms of the Agreement. As such, she was then not entitled to be paid \$240.00. If the Respondent was not performing the Agreement, she was not entitled to be paid according to the Agreement, and the Claimant would not be subject to the reduced rental payment based upon the Agreement. I conclude that the Claimant has shown he has suffered an actual loss of \$3,300.00 as a result of the acts and omission of the Respondent which amounted to embezzlement, false pretenses,

fraud or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (2010). Therefore, I find that the Claimant is entitled to an award of \$3,300.00 from the Fund Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (2010); COMAR 09.11.01.18.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Facts and Discussion, I conclude as a matter of law that the Claimant suffered an actual loss and is entitled to reimbursement from the Fund in the amount of \$3,300.00, for actual losses resulting from the Respondent's actions or omissions. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(1), (2) and 17-410(b)(1) (2010); COMAR 09.11.01.18 and 09.11.03.04.

RECOMMENDED ORDER

I **RECOMMEND** that the MREC **ORDER**:

That the Claimant's claim against the Maryland Real Estate Guaranty Fund be **ACCEPTED** in the amount of \$3,300.00; and further,

That the records and publications of the Maryland Real Estate Commission reflect its final decision.

August 20, 2012
Date Decision Issued

SIGNATURE ON FILE

A. J. Novotny, Jr.
Administrative Law Judge

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