

OCT 31 2012

IN THE MATTER OF
THE CLAIM OF REZLINE
ALENCHERRY, CLAIMANT

v.

THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND
FOR THE ALLEGED MISCONDUCT
OF SUE ANNE WILLISON,
REAL ESTATE BROKER

* BEFORE NANCY E. PAIGE,
* ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS

MARYLAND REAL
ESTATE COMMISSION

OAH NOS: DLR-REC-22-12-12307

MREC NO: 2012-RE-195 G.F.

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated August 8, 2012, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 26th day of September, 2012,

ORDERED,

- A. That the Findings of Fact in the Recommended Decision be, and hereby are, AFFIRMED;
- 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,

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

MARYLAND STATE REAL ESTATE COMMISSION

SIGNATURE ON FILE

By:

Marla S. Johnson, Commissioner

September 26, 2012
Date

IN THE MATTER OF THE CLAIM OF:	* BEFORE NANCY E. PAIGE,
REXLINE ALENCHERRY,	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND REAL	* OF THE MARYLAND OFFICE
ESTATE GUARANTY FUND,	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED MISCONDUCT	* OAH No. DLR-REC-22-12-12307
OF SUE ANN WILLISON	* REC No. 2012-RE-195GF
* * * * *	* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
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CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On October 26, 2011, Rexline Alencherry (Claimant) filed a claim with the Maryland Real Estate Guaranty Fund (Fund), established by the Maryland Real Estate Commission (REC), for reimbursement of actual losses in the amount of \$3,500.00, suffered as a result of the alleged misconduct by Sue Ann Willison (Respondent), a licensed real estate salesperson at relevant times. On March 9, 2012, the REC transmitted the case to the Office of Administrative Hearings (OAH) for a contested case hearing.

On May 17, 2012, I conducted a hearing at the Frederick County Department of Social Services, 100 All Saints Street, Frederick, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-407(c)(2)(ii) (2010). The Claimant was present and represented herself. Jessica Kaufman, Assistant Attorney General, represented the Fund. The Respondent failed to appear at the hearing.

The contested case provisions of the Administrative Procedure Act, the procedures for Administrative Hearings of the Department of Labor, Licensing and Regulation (DLLR), and the Rules of Procedure of the OAH govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2011); Code of Maryland Regulations (COMAR) 09.01.03; 09.11.03; and 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

Cl. #1. February 18, 2010 Property Management and Exclusive Rental Agreement

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

GF #1. April 11, 2012 Notice of Hearing with attached certified mail receipts

GF #2. March 9, 2012 Transmittal by DLLR REC to OAH

GF #3. October 26, 2011 Complaint and Guaranty Fund Claim

GF #4. May 1, 2012 REC Professional License History

GF #5. March 12, 2012 Affidavit of Steven Long

GF #6. December 12, 2011 REC Report of Investigation, with six attached exhibits.

As the Respondent was not present, she offered no exhibits.

Testimony

The Claimant testified on her own behalf. The Fund offered the testimony of Jack M. Mill, Jr., DLLR investigator for the REC. As the Respondent was not present, she offered no testimony.

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.
2. The Respondent's license was terminated on June 28, 2011 and revoked on November 22, 2011.
3. On or about February 25, 2010, the Claimant and Respondent, in her capacity as agent of West Patrick Property Solutions, a Frederick, Maryland-based company she had created, entered into a Property Management and Exclusive Rental Agreement (the Management Agreement). The Management Agreement directed the Respondent to rent, lease, operate and manage the Claimant's investment property located at 322 St. Paul Street in Boonesboro, Maryland (the Property).
4. On or about October 1, 2010, the Respondent entered into a Residential Dwelling Lease (the Lease) with a tenant (the Tenant) for the Property. Pursuant to the Lease, the Tenant paid rent at \$875.00 per month, through May 2011. The Tenant also paid a security deposit of \$875.00.
5. Pursuant to the Management Agreement, the Respondent was entitled to a leasing fee of 50% of the Tenant's first full month's rent and compensation for management services at the rate of \$45.00 per month each subsequent month .
6. The Respondent failed to remit to the Claimant her share of the Tenant's rent for the months of February through June 2010. (The Tenant failed to pay rent in June, so her security deposit was applied to June rent.)
7. The Respondent entered into a Consent Decree on November 22, 2011, in which she admitted, *inter alia*, that she had violated § 17-322(b)(22) of the Business Occupations and Professions Article, by failing to account for or submit funds to various

complainants, including the Claimant, and agreed, *inter alia*, to the revocation of her license and not to contest the claims of various complainants, including the Claimant, against the Fund.

DISCUSSION

A person may recover compensation from the Fund for an actual loss based on an act or omission that occurs in the provision of real estate brokerage services by a licensed real estate broker or licensed real estate salesperson that involves a transaction related to real estate located in the State. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(i), (ii) (2010). For misconduct to be compensable, the act or omission must constitute either theft, embezzlement, false pretenses, forgery, fraud or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(2)(iii), 17-402(c) (2010); COMAR 09.11.03.04. At a hearing concerning a claim against the Fund, the burden of proof shall be on the claimant to establish the validity of the claim. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2010). The REC shall order payment of a claim by the Fund for the actual monetary loss, up to \$25,000, suffered by the claimant. Md. Code Ann., Bus. Occ. & Prof. § 17-410(a), (b) (2010).

Furthermore, COMAR 09.11.01.18 sets forth the parameters of an actual loss as follows:

The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund, pursuant to Business Occupations and Professions Article, Title 17, Subtitle 4, Real Estate Guaranty Fund, Annotated Code of Maryland, 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. Actual monetary losses 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, or any attorney's fees the claimant may incur in pursuing or perfecting the claim against the guaranty fund.

Two categories of acts or omissions may give rise to an actual loss. In the first, money or property is obtained by a licensee by theft, embezzlement, false pretenses or forgery. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(iii)(1). The second category involves a licensee's act or

omission that constitutes fraud or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(iii)(2); COMAR 09.11.03.04B(1).

The statute includes the following relevant definitions at section 17-101 of the Business Occupations and Professions Article:

(a) *In general.*- In this title the following words have the meanings indicated.

...

(j) *Licensed real estate salesperson.*- “Licensed real estate salesperson” means, unless the context requires otherwise, a real estate salesperson who is licensed by the Commission to provide real estate brokerage services on behalf of a licensed real estate broker with whom the real estate salesperson is affiliated.

...

(l) *Provide real estate brokerage services.*- “Provide real estate brokerage services” means to engage in any of the following activities:

(1) for consideration, providing any of the following services for another person:

- (i) selling, buying, exchanging, or leasing any real estate; or
- (ii) collecting rent for the use of any real estate;

...

(m) *Real estate.*-

(1) “Real estate” means any interest in real property that is located in this State or elsewhere.

...

Md. Code Ann., Bus. Occ. & Prof. § 17-101 (2010).

The essential facts in this proceeding are not in dispute. The Claimant executed a property management and leasing agreement with the Respondent to lease and manage the Claimant’s Property. The Respondent secured a tenant for the Claimant’s Property and also entered a lease agreement with the Tenant to collect rent.

The evidence established that in the months of February through May 2011, the Respondent collected \$875.00 in rent payments from the Tenant, but failed to remit any portion to the Claimant in each of those months, as required by the Management Agreement. The evidence also establishes that the Respondent collected a security deposit from the Tenant of

\$875.00. The Tenant did not pay rent for the month of June 2010, so the security deposit was applied to her rent.

The Respondent admitted that her failure to pay amounts due to the Claimant violated § 17-322(b)(22) of the Business Occupations and Professions Article, and the evidence is consistent with that admission. There is no dispute that the Respondent was a licensed real estate salesperson at relevant times and that the transactions in question involved real estate brokerage services. Md. Code Ann., Bus. Occ. & Prof. § 17-101(a) (2010). The Respondent's actions amounted to theft of the Claimant's money, and she is therefore entitled to compensation from the Fund for her actual loss. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(2), 17-402(c) (2010); COMAR 09.11.03.04.

Amount of Actual Loss

The statute permits a claimant to recover compensation from the Fund for an actual loss up to a maximum of \$25,000.00. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a), (b). The statute further provides that the REC may order payment by the Fund "only for the actual monetary loss suffered by the claimant. . . ." Md. Code Ann., Bus. Occ. & Prof. § 17-410(b)(1). The regulations also provide that the compensation recoverable from the Fund is "restricted to the actual monetary loss incurred by the claimant," is limited to "the monetary loss from the originating transaction," and "may not include commissions owed to a licensee . . . acting in his capacity as a principal or agent in a real estate transaction. . . ." COMAR 09.11.01.18.

In her Complaint, the Claimant sought to recover \$3,500.00 for four months rent (February through May). At the hearing, she amended her claim to include the amount of the security deposit applied to June rent, for a total claim of \$4,375.00.

The Fund did not object to paying the Claimant the full rental amount, without deduction the \$45.00 per month management fee provided for in the Management Agreement, on the

theory that, in view of her theft of the Claimant's funds, the Respondent had not earned the compensation. While that logic may be appropriate in a contract action, I do not find that the \$45.00 per month management fee is part of the Claimant's actual loss under COMAR 09.11.01.18, because "[a]ctual monetary losses 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. . . ." Therefore, I conclude that the Claimant is only entitled to recover \$830.00 for each of the months in which the Respondent failed to remit the rent payments, including the month paid for by the security deposit, for a total of \$4,150.00.¹ Accordingly, I conclude that the Claimant is entitled to reimbursement from the Fund in the amount of \$4,150.00.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Facts and Discussion, I conclude that the Claimant is entitled to reimbursement from the Real Estate Guaranty Fund in the amount of \$4,150.00 for actual losses resulting from the Respondent's theft. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(2)(iii)(1), 17-410(b)(1) (2010); COMAR 09.11.01.18; 09.11.03.04.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, I hereby **RECOMMEND** that the Maryland Real Estate Commission:

ORDER that the Claimant's claim against the Maryland Real Estate Guaranty Fund be **ACCEPTED** in the amount of \$4,150.00; and that it further,

¹Although not expressly addressed by the Claimant, the lease had been in effect for several months before the Respondent ceased remitting rent to the Claimant, and I infer that the Respondent would have collected her leasing fee, as well as her management fee, during that time.

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

August 8, 2012
Date Decision Mailed

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SIGNATURE ON FILE
Nancy E. Paige
Administrative Law Judge