

THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE * BEFORE LAURIE BENNETT,
 CLAIM OF STEPHEN DUFFY, * ADMINISTRATIVE LAW JUDGE
 CLAIMANT, * OF THE MARYLAND OFFICE OF
 V. . * ADMINISTRATIVE HEARINGS
 THE MARYLAND REAL ESTATE *
 COMMISSION GUARANTY FUND * OAH NOS: DLR-REC-22-12-19751
 FOR THE ALLEGED MISCONDUCT *
 OF RONALD ST. PIERRE, * MREC NO: 2012-RE-211 G.F.
 SALESPERSON, *
 * * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated October 23, 2012, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 27th day of November, 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

11/28/2012
Date

By: _____
Marla S. Johnson, Commissioner

MARYLAND REAL ESTATE

* BEFORE GEORGIA BRADY,

COMMISSION

* AN ADMINISTRATIVE LAW JUDGE

and

* OF THE MARYLAND OFFICE OF

KEVIN SLIFER,

* ADMINISTRATIVE HEARINGS

THE CLAIMANT

*

OAH No.: DLR-REC-24-12-14136

v.

*

REC CASE No.: 2008-RE-277

DANIEL A. MOXLEY,

*

THE RESPONDENT

*

* * * * *

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 August 29, 2007, Kevin Slifer (the Claimant) filed a Complaint against a licensed real estate agent, Daniel A. Moxley (the Respondent), and a claim for reimbursement (the Claim) from the Maryland Real Estate Guaranty Fund (the Fund) for losses the Claimant allegedly incurred as a result of the Respondent's misconduct. After investigation, the Maryland Real Estate Commission (the MREC or the Commission) issued a March 5, 2012 Statement of Charges and Order for Hearing against the

Respondent for his alleged violations of sections 17-322(b)(25), (32) and (33) and 17-601 of the Maryland Annotated Code's Business Occupations and Professions Article (the Business Occupations Article), as well as Code of Maryland Regulations (COMAR) 09.11.02.01H and 09.11.02.02A. On March 15, 2012, the Commission forwarded the Claim and the Statement of Charges to the Office of Administrative Hearings (OAH) for a hearing and issuance of a recommended order.

On August 22, 2012, I conducted the consolidated hearing on the Claim and the Statement of Charges at the offices of the Frederick County Department of Social Services in Frederick, Maryland, pursuant to Section 17-408 of the Business Occupations Article. The Claimant represented himself. The Respondent represented himself.¹ Assistant Attorney General Kris King represented the Commission and the Fund.

The Administrative Procedure Act, Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2009 and Supp. 2012), COMAR 09.11.03, and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

ISSUES

1. Did the Respondent violate Business Occupations Article section 17-322(b)(25) by engaging in conduct that demonstrated bad faith, incompetency, or untrustworthiness or that constituted dishonest, fraudulent, or improper dealings?
2. Did the Respondent violate Business Occupations Article section 17-601(b) by allowing his wife and assistant, Theresa Moxley, to provide real estate brokerage services when she was not licensed by the Commission?

¹ Gerard G. Magrogan, Esquire, entered but later withdrew his appearance on behalf of the Respondent, prior to the hearing.

3. If the Respondent violated the above sections of the Business Occupations Article, did he thereby violate Business Occupations Article section 17-322(b)(32)?

4. Did the Respondent violate COMAR 09.11.02.01H by failing to place all real estate transactions in writing and provide copies to the Claimant in a timely fashion?

5. Did the Respondent violate COMAR 09.11.02.02A by failing to protect and promote the interests of the Claimant?

6. Did the Respondent violate Business Occupations Article section 17-322(b)(33), by violating the provisions of COMAR 09.11.02.01H or COMAR 09.11.02.02A?

7. What, if any, sanctions and or penalties should be imposed against the Respondent?

8. What, if any, amount should be awarded to the Claimant from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits:

The Commission submitted the following documents, which I admitted into evidence as the following numbered exhibits:

1. Notice of Hearing, with attached documentation regarding receipt
2. Statement of Charges and Order for Hearing
3. Respondent's Licensing History
4. Report of Investigation by Jennifer Grimes, MREC Investigator, received October 23, 2007 and closed June 29, 2010
5. MREC Guidelines for the Use of Unlicensed Employees

Neither the Claimant nor the Respondent submitted any documents for admission into evidence.

Testimony

The Commission presented the Claimant and Jennifer Grimes, MREC Investigator, as witnesses. The Claimant testified on behalf of himself and called his neighbor, Gricel Gourley, as a witness. The Respondent did not testify or call any witnesses on his behalf.

FINDINGS OF FACT

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

1. At all relevant times, the Respondent has been a licensed real estate salesperson.
2. At the time of the events at issue in this case, the Respondent was affiliated with Re/Max Metropolitan Realty.
3. No prior complaints have been filed with the Commission against the Respondent.
4. In late Fall 2005, the Claimant put a downpayment on a lot in a subdivision development with the intent to purchase a newly constructed home for his family to be built on that lot.
5. The Respondent assisted the Claimant in his purchase of this lot and was to have received a commission on the total cost of the purchase of the lot and the construction of the new home, in total, a \$550,000.00 purchase.
6. Construction began on the new home in April 2006.
7. On April 13, 2006, the Claimant signed a listing agreement with the Respondent, under the terms of which the Respondent would list and market for sale the Claimant's existing home at 5502 Roy Court in New Market, Maryland (Roy Court home).

8. The Roy Court home was originally listed for sale at a price of \$390,900.00. This price was reduced over the next several months to \$384,900.00 and, by September 2007, to \$355,000.00.²

9. The Maryland Multiple Listing Service (MLS) description of the Roy Court home identifies the Respondent's wife as the "show contact."

10. The Respondent's wife was not licensed by the MREC, nor was she employed by the Respondent or by any real estate broker.

11. Within a few days after execution of the listing agreement, the Respondent and his wife met with the Claimant and his wife to discuss holding an open house to market the Roy Court home.

12. The Respondent's wife held an open house at the Roy Court home in late April or early May 2006. The Respondent was not present in the home when the Claimants left the home for the open house and was not present when the Claimants returned home after the open house.

13. In May 2006, Gricel Gourley called the Respondent and asked to see the Roy Court home.

14. Ms. Gourley and several of her family members met the Respondent and his wife at the Roy Court home. The Respondent's wife walked Ms. Gourley and her family members through the home and provided them with a copy of the listing and a flyer about the property. The Respondent remained in his car, on the driveway of the Roy Court home, while his wife was inside the house with the Gourleys.

15. After finishing the house tour, Ms. Gourley met the Respondent outside and asked him any questions she had about the Roy Court home.

² The parties did not establish when these price reductions were posted.

16. Ms. Gourley contacted the Respondent a few days thereafter and offered to buy the Roy Court home for \$350,000.00.

17. At the time Ms. Gourley presented her offer, the Roy Court home was still listed for \$390,900.00, the Claimant's mortgages on the property totaled approximately \$345,000.00, and the Claimant's plan for the sale was to gain sufficient funds to both pay off the mortgages and apply toward the cost of the new home then under construction.

18. The Respondent told Ms. Gourley that her offer, which was for thirty to forty thousand dollars less than the listing price, was ridiculously low. Ms. Gourley asked the Respondent to present the offer to the Claimant.

19. The Respondent told the Claimant that he had received an offer on the Roy Court property but that it was too low.

20. The Claimant did not ask the Respondent for details of that offer.

21. Ms. Gourley did not receive any further response from the Respondent or the Claimant and bought another home for \$353,000.00.

22. Settlement on the Claimant's new home was scheduled for September 1, 2006.

23. In late July or early August 2006, the Claimant became concerned about whether he should proceed to settlement on the new home because the Roy Court home had not yet sold and he was unsure of whether he could handle two mortgages at the same time.

24. The Respondent informed the Claimant that if the Roy Court home had not sold by the time of settlement on the new house, the Respondent would take over the payments on the Roy Court home, and, if necessary, buy it himself.

25. The Respondent did not put his offer in writing.

26. The Claimant agreed with the Respondent's proposal and proceeded to settlement on the new house even though he did not have the Respondent's agreement in writing.

27. The Claimant provided the Respondent with the following pertinent items and information pertaining to the Roy Court home: the Claimant's mortgage bills; his home-owners association dues; his water and sewer bills; and house keys.

28. The Claimant moved out of the Roy Court home and into the new home in September 2006.

29. On September 25, 2006, the Respondent received a written offer on the Roy Court home for \$385,000.00. The Claimant accepted the offer and entered into a contract. The buyer's financing failed and the Roy Court home was not sold.

30. The Respondent paid the mortgage and all other costs associated with the Roy Court home from September 2006 through January 2007.

31. In January 2007, the Respondent's wife informed the Claimant that the Respondent would no longer pay any of the expenses for the Roy Court home, and that the Respondent would no longer make any further efforts to sell it.

32. In January 2007, when the Roy Court home had still not sold, the Respondent and/or his wife arranged to lease the Roy Court home to a tenant, beginning February 28, 2007, for \$1,500.00 per month.

33. The Claimant approved and signed the lease for the Roy Court home.

34. The tenant remained in the home and paid \$1,500 monthly in rent from February 28, 2007 through the end of August 2007.

35. The Respondent or his wife collected all of the tenant's rent checks from February 2007 through August 2007 and promptly turned them over to the Claimant.

36. The Claimant's monthly mortgage on the Roy Court house between January 2007 and November 2007 was \$2,200.00 per month.

37. The Claimant applied the \$1,500.00 per month that he received from rent on the Roy Court home toward his mortgage on that property and paid an additional \$700.00 per month from February 2007 through August 2007. The Claimant paid the full mortgage payment on the Roy Court home from September 2007 through November 2007.

38. The Claimant filed for bankruptcy in November 2007 and was discharged of his obligations with regard to the Roy Court home.

39. The Respondent did not seek or receive any commission or property management fees from his transactions regarding the Roy Court home.

DISCUSSION

The Respondent's Alleged Violations of Statutes and Regulations

Pursuant to section 17-322(b) of the Business Occupations Article, the Commission may reprimand any licensee or suspend or revoke a license if that licensee violates any other provision of that title of the Business Occupations Article, any regulation adopted under that title, or any provision of the Code of Ethics.

The Commission has charged the Respondent with violations of sections 17-322(b)(25), (32), and (33) and of section 17-601 of the Business Occupations Article. The Commission has also charged the Respondent with violating his Code of Ethics to protect and promote the interests of his client, as stated in COMAR 09.11.02.02A, and

with failing to place all financial obligations and commitments regarding real estate transactions in writing, as required by COMAR 09.11.02.01H.

Alleged Violation of Section 17-601

Section 17-601 of the Business Occupations Article addresses Maryland's legal requirement that a person be licensed to provide "real estate brokerage services." The Commission charges the Respondent with violation of subsection (b) of the statute based on the allegation that he permitted or encouraged his wife, a person who was not licensed by the MREC, to provide such services. The entire statute reads as follows:

§ 17-601. Providing real estate brokerage services without license

(a) Real estate broker. -- Except as otherwise provided in this title, a person may not provide, attempt to provide, or offer to provide real estate brokerage services unless licensed by the Commission as a real estate broker.

(b) Associate real estate broker and real estate salesperson. -- Except as otherwise provided in this title, a person may not, on behalf of a real estate broker, provide, attempt to provide, or offer to provide real estate brokerage services unless licensed by the Commission as an associate real estate broker or a real estate salesperson to provide real estate brokerage services for that real estate broker.

After consideration of this statute and the facts of this case, I cannot find that it applies to the Respondent's actions and will recommend to the MREC that this charge be dismissed.

The subject of the lengthy sentence in section 17-601(b) is very clearly "a person." The actions of that "person" prohibited by this statute are "on behalf of a real estate broker, [to] provide, attempt to provide, or offer to provide real estate brokerage services unless [a person is] licensed by the Commission" There is only one "person" who is restricted in this statute – the unlicensed person who "provide[s],

attempt[s] to provide, or offer[s] to provide” real estate brokerage services. This law contains no language targeting acts by a licensed person to offer to or to attempt to provide real estate brokerage services through someone *else* who is unlicensed. It is only the *unlicensed person himself or herself* that is the focus of this statute. In this case, the only unlicensed person was the Respondent’s wife, not the Respondent. As the Respondent’s wife is not a person who is charged in the case before me, I must recommend dismissal of this charge.

In making this determination, I looked for guidance to a similar statutory system enacted by the Maryland General Assembly to regulate the medical profession. I found that the language in section 17-601 of the Business Occupations Article is remarkably similar to that used to prohibit the unlicensed practice of medicine. That statute, section 14-601 of the Health Occupations Article of the Maryland Annotated Code, states “[e]xcept as otherwise provided in this title, *a person* may not *practice, attempt to practice, or offer to practice* medicine in this State unless licensed by the Board [of Physicians].” (emphasis added). Section 14-601 of the Health Occupations Article, like section 17-601 of the Business Occupations Article, clearly focuses on the acts of the individual who is practicing or attempting to practice a licensed profession without a license.

Significantly, the Health Occupations Article contains a separate provision that sanctions a licensed physician who supports the unauthorized practice of medicine by another person. In section 14-404(a)(18) of the Health Occupations Article, a physician may be disciplined for practicing “*medicine with an unauthorized person or aid[ing] an unauthorized person* in the practice of medicine.” Md. Code Ann., Health Occupations

§ 14-404(a)(18) (emphasis added). The plain language reading of section 17-601 – showing that the statute applies only to the actor who attempts to provide real estate brokerage services without being licensed -- is supported by a statutory system that separates sanctions for licensed persons from sanctions for unlicensed persons. There may be a statute in Title 17 that prohibits a licensed real estate agent from providing “real estate brokerage services” through an unlicensed person or with aiding an unlicensed person to provide real estate brokerage services, but the Commission did not charge this Respondent with it. Since it is clear that the Maryland legislature is aware of the distinction between acting as an unlicensed professional and encouraging someone else to act as an unlicensed professional, *see* Md. Code Ann., Health Occ. §§14-601, 14-404(a)(18), I interpret the plain language of Business Occupations section 17-601(b) as only prohibiting an unlicensed person from acting as a real estate agent. As the Respondent is indisputably licensed, this statute does not apply to his acts in this case.

The Commission produced as its exhibit 5 MREC policy regarding the actions of unlicensed employees. It offered this document to persuade me that the actions of the Respondent’s wife constituted the provision of real estate brokerage services. Because the only person charged in this case is the Respondent and I have found no grounds under section 17-601(b) to hold him responsible for the actions of his wife, I need not decide whether the wife’s actions constituted the provision of real estate brokerage services and, therefore, have not considered this exhibit.

Alleged violation of section 17-322(b)(25)

Section 17-322(b)(25) of the Business Occupations Article prohibits a licensed real estate professional from “engag[ing] in conduct that demonstrates bad faith,

incompetency, or untrustworthiness or that constitutes dishonest, fraudulent or improper dealings.” In its closing argument, the Commission argued that the Respondent had “engaged in conduct that demonstrate[ed] bad faith” and/or that he had “engaged in conduct that . . . constitutes dishonest . . . dealings” by failing to provide the Respondent with details about Ms. Gourley’s offer and by failing to comply with his agreement to continue to make payments on or to buy the Roy Court home.

Title 17 of the Business Occupations Article does not define the term “bad faith” but it is generally considered to be

The opposite of “good faith,” generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.

Black’s Law Dictionary Free Online Legal Dictionary (2d ed.).³ A finding of “bad faith” typically arises from an intentional dishonest act, misleading someone, entering into an agreement without the intention of fulfilling it or violating basic standards of honesty in dealing with others.⁴ The evidence in this case does not establish, by a preponderance, “bad faith” on the part of the Respondent. It establishes that the Respondent made a verbal agreement with the Claimant to either buy the Roy Court home or keep up payments on its mortgage until the house was sold; and, it establishes that the Respondent later considered that to be a bad deal and stopped making those payments; but this change of heart or reassessment alone is not sufficient to establish “bad faith.” Similarly, failing to convey the details of an offer, in and of itself, does not rise to the level of “bad faith.”

³ <http://thelawdictionary.org/bad-faith/>

⁴ See <http://legal-dictionary.thefreedictionary.com/bad+faith>

The evidence, in fact, establishes the contrary. Although he did not carry through with this verbal agreement, the Respondent did everything he reasonably could do to substantially comply with his promise for an entire year. He took care of all the expenses on the home for four months: September 2006 through January 2007. When this became untenable, he arranged for a tenant for the property that covered, by the Claimant's own admission, three-quarters of the mortgage, and, in addition, the Respondent or his wife acted as a property manager, free-of-charge, collecting rents and forwarding them to the Claimant for another seven months. These actions taken by the Respondent after he made the verbal agreement and after he "breached" it support a conclusion that the Respondent entered into the agreement in good faith, not bad. I find no evidence of an intentional dishonest act by the Respondent in the testimony or documents submitted in this case. Breach, particularly of a verbal agreement, does not in and of itself establish bad faith or dishonest dealings. I recommend that the Commission dismiss this charge as well.

Section 17-322(b)(32) states that the Commission may reprimand, suspend, or revoke a real estate license if the Licensee violates any provision of Title 17. Because I have found insufficient evidence of a violation of either of the two statutes the Respondent is charged with violating, section 17-601 and section 17-322(b)(25), I will recommend that the Commission dismiss this charge as well.

Alleged violation of COMAR 09.11.02.01H

Real estate agents and brokers, as the professionals in real estate transactions, are responsible for ensuring that "financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreement of the parties" and that

copies of the agreements are provided to all parties involved. COMAR 09.11.02.01H. The Commission charges that the Respondent failed to meet his obligations under this regulation by failing to put in writing his agreement to take over the Claimant's mortgage payments on the Roy Court home or, if the house did not sell, to buy it himself. There is no dispute that the Respondent failed to do this. He did not testify and so produced no explanation for the absence of a written agreement with the Claimant. The Commission has carried its burden of proof on this charge.

Alleged Violation of COMAR 09.11.02.02A

Maryland real estate professionals are required to "protect and promote the interests" of their clients. COMAR 09.11.02.02A. This obligation, set out in the profession's Code of Ethics, is described as one of "absolute fidelity to the client's interest." *Id.* The Commission charges the Respondent with failing to meet this obligation in two ways: first, by failing to provide the Claimant with the details of the Gourley offer on the Roy Court home; and, second, by failing to abide by the agreement he made with the Claimant, and, arguably, by even entering into the agreement he had with the Claimant.

As noted above, the Respondent did not testify in this hearing and, thus, I did not have the benefit of his recollection about how much he told the Claimant about the Gourley offer, nor did I have an explanation of his reasons for entering into the agreement to take over the Claimant's mortgage on the Roy Court home. Even without it, the preponderance of the evidence displays a scenario in which both the Claimant and the Respondent considered that the Roy Court home, like many other properties on the market in 2006, would move quickly and would sell for far more than was owed on it.

There is no evidence that the Respondent pressured the Claimant into the agreement, as shown by the fact that the Claimant had nearly a year from when he initially put a deposit down on the lot he wanted, to the date he settled on the new home, to consider what he might do if his old home did not sell before it was time to settle on the new one.

Weighing the potential loss of the Claimant's investment in the lot if he did not proceed with settlement, the Respondent's offer to take over his mortgage payments so the Claimant could proceed with the deal on the new house was a more than reasonable deal for the Claimant and, in light of the market conditions, also reasonable for the Respondent. Offering this deal was consistent with the Respondent's obligation to protect and promote his client's interest.

The Respondent was faithful to his promises for four to five months when, finding that this property had not sold for nearly a year, he gave up. "Absolute fidelity" to his client's interest would have required that the Respondent continue to make payments on the Roy Court home. Because he failed to do so, the Commission has carried its burden to prove that the Respondent violated this regulation in breaking his promise to his client.

The evidence also establishes that the Respondent failed to tell the Claimant the exact amount of the Gourley offer. Considering what the Claimant owed on the property, I agree that it seems unlikely that the Claimant would have accepted an offer for thirty to forty thousand dollars less than the list price particularly when that offer was presented shortly after the property went on the market. Nevertheless, it was the Respondent's obligation to present the details of that offer, so that the Claimant could fairly consider it. He failed to do so in violation of his obligations under COMAR 09.11.02.02A.

By violating both COMAR 09.11.02.01H and COMAR 09.11.02.02A, the Respondent also violated Business Occupations section 17-322(b)(33), which prohibits a licensee from violating any applicable regulation.

Regulatory Sanctions/Penalties

Instead of or in addition to reprimanding, suspending or revoking a real estate licensee for his or her violation of the above statutes and regulations, section 17-322(c) of the Business Occupations Article permits assessment of up to a \$2,000.00 monetary penalty,⁵ per violation, applying the following criteria:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee.

The Commission's representative recommended that the Respondent pay the maximum penalty for each violation and that his license be suspended for sixty days.

The Respondent has no history of any previous violations. As discussed above, although he failed to abide by his oral agreement to buy the Claimant's home, I find that the Respondent demonstrated good faith in his attempts to do so. There is a distinct absence of both deceit by and of undue pressure placed upon the Claimant by the Respondent.

The Claimant, who had counted on the Respondent taking over his mortgage, was harmed by the Respondent's failure to do so; that harm was mitigated by the Respondent's efforts toward and success in renting the property.

It is more difficult to assess the harm to the Claimant from the Respondent's failure to communicate the details of the Gourley offer. I do not find it likely that the

⁵ Business Occupations Article 17-322(c)(3) provides that the Commission "shall pay any penalty collected under this subsection into the General Fund of the State."

Claimant would have accepted the Gourley offer at the time it was made, although hearing those details would have given the Respondent the opportunity to make a counter offer. The fact that Ms. Gourley found another acceptable home and paid only \$3,000.00 more for it than she offered for the Roy Court home, also makes it unlikely that she would have agreed to any substantial counteroffer produced by the Respondent/Claimant. I received no explanation, however, of why the Claimant, hearing that a “too low” offer had been made, did not question the Respondent about the details of the offer. In retrospect, this offer understandably looms large in the mind of the Claimant. It is only fair, however, to assess the violation in light of the circumstances in which it occurred. When I weigh both the Respondent’s actions and those of the Claimant, I find some, but not an egregious amount of harm caused by the Respondent’s failure to communicate the details of the Gourley offer.

The Respondent’s ultimate failure to comply with his promise to continue paying the mortgage on the Roy Court home and/or to buy the home, and the Respondent’s failure to put this agreement in writing, were serious violations of his obligations to his client. In contrast, because I find it unlikely that the Claimant would have accepted the Gourley offer at the time it was made, I do not find the Respondent’s failure to convey the details of the Gourley offer to the Claimant to be a serious violation under all the circumstances at the time of the violation.

In considering the amount of harm *caused* by the Respondent’s violations, I also considered the Claimant’s actions in handling the matters surrounding these transactions. The Claimant was fully informed about the risks of the deal he made with the Respondent. He and the Respondent discussed the pros and cons of proceeding to

settlement on the new home while the Claimant was still legally responsible for the large mortgage on the Roy Court home, versus taking a loss on the lot and waiting until the Roy Court home was sold before he went to settlement on the new home. Under these circumstances, I have to question why the Claimant, who was so concerned about proceeding to settlement on a second house while he still had a large obligation on his first, would not have halted or postponed settlement on the new home until he had received a formal written agreement with the Respondent on the Roy Court home. The Claimant can not be completely absolved of his obligation to protect his own interests and, thus, some responsibility for the financial harm he suffered still rests with him. I also question why the Claimant would not have applied even a little pressure on the Respondent – even exhibited some curiosity – to obtain the details of the Gourley offer. Again, as an adult carrying financial obligation, I cannot find that all of the “cause” for the Claimant’s financial woes rests with the Respondent. The Claimant was not absolved of all responsibility in a real estate transaction simply because a real estate professional was involved.

After weighing all these facts against the penalty criteria, I decline to assess the maximum penalty of \$2,000.00 for each violation of COMAR 09.11.02.01H and COMAR 09.11.02.02A. Of the four criteria, only two apply because there is evidence of good faith and the Respondent has no history of prior violations. The Respondent’s failure to put into writing his offer to take over the mortgage payments and his failure to keep that promise are serious violations and both caused harm to the Claimant. These actions constitute one violation of COMAR 09.11.02.01H and one violation of COMAR

09.11.02.02A. I assess a penalty of \$1,000.00 for each of these violations. The Respondent's failure to communicate the Gourley offer caused some harm but I have not found that to be a serious violation. This action was also a violation of COMAR

09.11.02.02A. I will assess a penalty of \$250.00 for that violation. I therefore recommend that the Commission assess a total penalty of \$2,250.00.

Although the Respondent undeniably failed to meet all of his obligations in this case, I find that the efforts he made to protect his client's interests make a suspension inappropriate in this case. I will therefore recommend that the Commission impose a total sanction in this case of the \$2,250.00 penalty and a reprimand on the Respondent's license.

Guaranty Fund Claim

Claims for reimbursement from the Fund are governed by section 17-404 of the Business Occupations Article, which states, in pertinent part, as follows:

§ 17-404. Claims against the Guaranty Fund.

(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:

...

3. a licensed real estate salesperson;

...

(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.

With respect to claims against the Fund, COMAR 09.11.03.04 further provides as follows:

.04 Claims Against the Guaranty Fund.

A. A guaranty fund claim shall be based on the alleged misconduct of a licensee.

B. For the purpose of a guaranty fund claim, misconduct:

(1) Is an action arising out of a real estate transaction involving real estate located in this State which causes actual loss by reason of theft or embezzlement of money or property, or money or property unlawfully obtained from a person by false pretense, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit;

(2) Is performed by an unlicensed employee of a real estate broker or by a duly licensed real estate broker, associate broker, or salesperson; and

(3) Involves conduct for which a license is required by Business Occupations and Professions Article, Title 17, Annotated Code of Maryland.

The Claimant bears the burden of proof in pursuing his claim against the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e).

The Claimant described the basis for his claim as a misrepresentation by the Respondent that he would pay the mortgage on, or, buy the Roy Court home. The Claimant argues that this act is what caused all of his financial difficulties. He testified that it has been a rough five to six years during which his family has not been able to live a normal life. He has been unable to buy a car for his daughter, without raiding his 401K account, because his credit was ruined by taking bankruptcy. He has a large mortgage payment on the new house that he cannot refinance and his savings have substantially decreased. The Claimant was unable to specify the amount of his loss, saying “I don’t

know how much I've lost." He provided no documentation to support any loss calculation.

I have applied the statutory and regulatory requirements for a Fund award to this claim and find that the Claimant's evidence has fallen short of the eligibility threshold. Evidence in the record supports the first two criteria. The Claimant has proven the existence of an "act" by the Respondent (promising to take over the mortgage payments on the Roy Court home or to buy the property) and of an "omission" by the Respondent (to carry through with that promise) in relation to real estate in Maryland. His case fails at the third step; the point at which the Claimant must prove that he has suffered an actual loss that arises from "misconduct" by the Respondent.

Under Business Occupations section 17-404(a)(2)(iii), misconduct includes an act or omission by a licensed real estate agent "in which money or property was obtained from [the claimant] by theft, embezzlement, false pretenses, or forgery; or that constitutes fraud or misrepresentation." By regulation, misconduct is also described as including "artifice," "trickery," or "deceit." COMAR 09.11.03.04B(1). The Claimant bases his claim on "misrepresentation."

Maryland recognizes two distinct kinds of misrepresentation: fraudulent and negligent. Fraudulent misrepresentation, also known as an action for deceit, requires proof of scienter, an *intent* to deceive the other party. *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 333 (1982), *quoting Cahill v. Applegarth*, 98 Md. 493 (1904). No party has produced evidence that the Respondent had an *intent* to deceive the Claimant in any of

their dealings and, thus, there is no basis for a finding of fraudulent misrepresentation or deceit.

Negligent misrepresentation exists when all five of the following are present:

- (1) the defendant, owing a duty of care to the plaintiff, *negligently asserts a false statement*;
- (2) the defendant intends that his statement will be acted upon by the plaintiff;
- (3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
- (4) the plaintiff, justifiably, takes action in reliance on the statement; and
- (5) the plaintiff suffers damage proximately caused by the defendant's negligence.

Martens Chevrolet, 292 Md. at 337 (emphasis added). The Claimant is unable to establish negligent misrepresentation by the Respondent because he has failed to prove that the Respondent made a false statement in connection with his duty toward the Claimant.

The Respondent made an oral agreement with the Claimant to take over the payments on the home and, if it did not sell, to buy the property. There is no evidence that this statement was “false.” The evidence shows the contrary. The Respondent carried out the first portion of that bargain by taking over the payments on the property for four to five months. He did not buy the property, but still arranged to reduce the burden on the Claimant to pay what was still his mortgage on the Roy Court home by arranging for a renter and managing the property for the Claimant. While he ultimately may have breached the terms of the oral agreement, the Respondent’s actions over the course of several subsequent months clearly establish that he did not, in September 2006, make a false statement about that agreement. Without evidence of a “false statement,” there can be no “misrepresentation” under the law. The Claimant has failed to establish

eligibility for an award under that asserted basis or under any other basis set out in Business Occupations section 17-404. There is also no evidence of any artifice, trickery or deceit that would constitute the misconduct necessary to establish grounds for an award under COMAR 09.11.03.04B(2).

It is clear that the Claimant has been in a difficult financial situation as a result of his decision to purchase the new home at a time when he was still responsible for the mortgage on the Roy Court home. The Fund does not provide, however, for strict liability on a real estate agent for every real estate deal that goes awry, even when the real estate agent fails to carry out all of his obligations. Certain criteria must be established to prove eligibility for an award. Because they have not been established in this case, I must recommend that the Fund deny the Claimant's request to be reimbursed for any losses he may have suffered arising from this transaction.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I make the following conclusions as a matter of law:

- The Respondent did not engage in conduct that demonstrated bad faith, incompetency, or untrustworthiness or that constituted dishonest, fraudulent, or improper dealings in violation of Business Occupations Article section 17-322(b)(25);
- The Respondent is a licensed real estate agent and, in his provision of real estate brokerage services to the Claimant, did not violate Business Occupations Article section 17-601;

- The Respondent did not violate any statute under Title 17 of the Business Occupations Article and, thus, did not violate Business Occupations Article section 17-322(b)(32);
- The Respondent failed to ensure that his commitment to take over the mortgage payments on the Roy Court home and/or to buy the Roy Court home was placed in writing and thereby violated COMAR 09.11.02.01H;
- The Respondent failed to protect and promote the interest of his client by failing to continue to abide by his agreement to take over the mortgage payments on the Roy Court home and/or to buy the Roy Court home and by failing to fully inform the Claimant of the Gourley offer on the Roy Court home and, thereby, violated COMAR 09.11.02.02A; and,
- The Respondent violated regulations adopted under Title 17 of the Business Occupations Article, namely, COMAR 09.11.02.01H and 09.11.02.02A, and, thereby, violated Business Occupations Article section 17-322(b)(33).
- The Respondent should receive a reprimand from the Commission. Md. Code Ann., Bus. Occ. § 17-322(b).
- The Respondent should pay a monetary penalty of \$2,250.00 to the Commission. Md. Code Ann., Bus. Occ. § 17-322(c).
- The Claimant has failed to carry his burden to prove eligibility for an award from the Fund. Md. Code Ann., Bus. Occ. § 17-404(a)(1), (2); COMAR 09.11.03.04B(1).

contract required). Second, the Respondent misrepresented to the Claimant that the Property was still available for purchase when the Sibley/Allan contract pending.

CONCLUSIONS OF LAW

I conclude that the Claimant is eligible for reimbursement from the Real Estate Guaranty Fund in the amount of \$5,000.00 for actual losses resulting from the Respondent's acts. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(1), (2) and 17-410(b); COMAR 09.11.01.18 and 09.11.03.04.

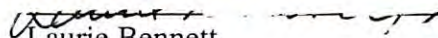
RECOMMENDED ORDER

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

that the Claimant's claim against the Maryland Real Estate Guaranty Fund be **ACCEPTED** in the amount of \$5,000.00; and
that the records and publications of the Maryland Real Estate Commission reflect its final decision.

October 23, 2012
Date Decision Mailed

SIGNATURE ON FILE


Laurie Bennett
Administrative Law Judge

LB/
138118