

FINAL ORDER

IN THE MATTER OF THE CLAIM OF
JOSE MELGARES GARCIA,
CLAIMANT,

v.

THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND
FOR THE ALLEGED MISCONDUCT OF
RICARDO JIMENEZ, LICENSED REAL
ESTATE SALESPERSON,
RESPONDENT

* BEFORE MICHAEL D. CARLIS
AUG 13 2012
* AN ADMINISTRATIVE LAW JUDGE
MARYLAND REAL
ESTATE COMMISSION
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH CASE No.: DLR-REC-22-11-41673
* MREC COMPLAINT No.: 11-RE-273GF

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RECOMMENDED DECISION

STATEMENT OF THE CASE
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RECOMMENDED ORDER

STATEMENT OF THE CASE

On January 18, 2011, Jose Rosali Melgares Garcia (Claimant) filed a claim for compensation before the Maryland Real Estate Commission (MREC) Guaranty Fund (Fund).¹ The Claimant seeks \$11,402.50 for an alleged actual loss caused by the misconduct of Ricardo Jimenez (Respondent) in the provision of real estate brokerage services.

¹ The MREC is a constituent unit of the Department of Labor, Licensing, and Regulation (Department).

On October 14, 2011, the MREC ordered a hearing on the Claimant's claim against the Fund. The MREC, on October 24, 2011, transmitted the case to the Office of Administrative Hearings (OAH) for a hearing.

On April 10, 2012, the OAH convened a hearing at its office in Wheaton, Maryland. Maria Aspiazu, Esquire, and Price Benowitz, LLP, represented the Claimant.² Jessica Berman Kaufman, Assistant Attorney General, and the Office of the Attorney General, represented the MREC Fund. The Respondent and his legal counsel failed to appear at the hearing.³

The Administrative Procedure Act, the procedural regulations of the Department, and the OAH Rules of Procedure 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) 09.01.02, 09.01.03, 09.11.03.02; and 28.02.01.

ISSUES

The issues are:

- A. 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,
- B. What amount of compensation from the MREC Guaranty Fund, if any, should be awarded to the Grievant.

² At the request of the Claimant, a Spanish language interpreter assisted throughout the hearing.

³ On January 19, 2012, and February 24, 2012, the OAH sent notices of the hearing to the parties. On April 5, 2012, the OAH received a written request from the Respondent to postpone the hearing because "I'm actually out of town attending family matters that requires [sic] my attention." The request was not served on the other parties. In response to the request, the OAH contacted the Respondent and requested that he submit documentation in support of the request. The Respondent failed to provide the requested documentation. The OAH also contacted the Respondent's attorney. The attorney indicated that he was unaware of the Respondent's request and that he would contact the Respondent for additional information and report back to the OAH. The attorney did not report back. I denied the request for a postponement under COMAR 28.02.01.16, based on the Respondent's failure (i) to document the reasons for the postponement and (ii) to establish good cause. The hearing was held in the Respondent's absence.

SUMMARY OF THE EVIDENCE

Exhibits

The following were admitted for the Claimant:

- Claimant #1: Regional Sales Contract, dated October 5, 2009;
- Claimant #2: Cancelled checks, numbers 281, 283, 295, 297, 310, 316, and 317;
- Claimant #3: Escrow Letter from the Respondent to the Claimant, dated May 19, 2010;
- Claimant #4: Settlement Agreement between the Respondent and Claimant, dated March 29, 2011; and
- Claimant #5: Settlement Agreement between the Respondent and Claimant, dated March 29, 2011.

The following were admitted for the Fund:⁴

- G.F. #1: Documents related to notices of the hearing sent to the parties (including a signed certificate, showing the Respondent's receipt of the notice);
- G.F. #2: Transmittal, with attachment;
- G.F. #3: Documents related to the Respondent's licensing history;
- G.F. #4: Complaint and Claim, with attachments;
- G.F. #5: Letter dated October 5, 2009, from J. Amarillo to the Respondent and M. Vasquez;
- G.F. #6: Memorandum dated May 19, 2010, from C. Montero at Bank of America;
- G.F. #7: Release Agreement; and
- G.F. #8: Letter from C. Mehta of United Realty International, dated February 18, 2011.

Testimony

The Claimant testified for himself.

The Fund offered no testimony.

⁴ G.F. ## 1-4 were pre-labeled by the MREC Fund as REC GF1-4, and I relabeled them as G.F. ##1-4.

FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. At all times relevant to this matter, the MREC licensed the Respondent as a Real Estate Salesperson⁵ under license number 3889900, working for United Realty International (United).
2. Sometime in or about March 2009, the Respondent, or someone working with him, contacted the Claimant and solicited his interest in looking for a house in Maryland to buy.
3. Between March 2009 and May 2010, the Respondent, or someone working for the Respondent, showed the Claimant houses in Maryland.
4. During this same time, the Respondent requested money from the Claimant for the purchase of property in Maryland and represented that the money would be used for appraisals and placed in United's escrow account for the purchase of a house.

⁵ A "licensed real estate sales person" is "unless the context requires otherwise, a real estate salesperson who is licensed by the [Maryland Real Estate] Commission to provide real estate brokerage services on behalf of a licensed real estate broker with whom the real estate salesperson is affiliated." Md. Code Ann., Bus. Occ. & Prof. § 17-101(j) (2010). "Provide real estate brokerage services" is:

- (i) 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;
 - (2) for consideration, assisting another person to locate or obtain for purchase or lease any residential real estate;
 - (3) engaging regularly in a business of dealing in real estate or leases or options on real estate;
 - (4) engaging in a business the primary purpose of which is promoting the sale of real estate through a listing in a publication issued primarily for the promotion of real estate sales;
 - (5) engaging in a business that subdivides land that is located in any state and sells the divided lots; or
 - (6) for consideration, serving as a consultant regarding any activity set forth in items (1) through (5) of this subsection.

5. Between May 2009 and June 2010, the Claimant gave the Respondent seven checks, totaling \$11,402.50 toward the purchase of a house. On May 19, 2010, the Respondent notified the Claimant in writing that he had deposited \$10,902.50 of the Claimant's money into United's escrow account for the purchase of a property in Silver Spring, Maryland.
6. The Respondent, or someone working for the Respondent, deposited the Claimant's checks into a bank account, but not in an account of United.
7. The Claimant was not able to obtain a loan to purchase a house.
8. The Respondent refused to return any of the Claimant's money to him.
9. After the Claimant filed the claim with the MREC, the Respondent, on March 29, 2011, executed a settlement agreement with the Claimant in which he promised to return \$11,400.00 to the Claimant. However, on September 2, 2011, the Claimant notified the MREC that the Respondent had not paid him any of the settlement amount.
10. The Claimant has attempted to contact the Respondent by telephone and in person, but the Respondent has not returned any telephone calls and offices located at the address of the Respondent's business location are vacant.
11. The Respondent has not returned any of the Claimant's money.

DISCUSSION

Review of the Relevant Law

The burden of proof is on the "claimant to establish the validity of the claim." Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2010).⁶ The burden is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009).

Section 17-404 governs claims against the Fund and provides as follows:

⁶ All subsequent citations to the Business Occupations and Professions Article shall be to sections only.

§ 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.

Summary of the Record

The Claimant testified that in or about March 2009, he received a telephone call from someone who told him that he could purchase a house for the same amount that he was then paying in rent. He agreed to have someone show him houses.

According to the Claimant, he saw "many" houses. On October 5, 2009, he entered into a contract to purchase a specific property in Silver Spring, Maryland. Claimant #1 is a Regional Sales Contract (Contract) signed by the Claimant. United is listed as the selling company and the Respondent as the selling agent. The Contract indicates that the Claimant "has delivered a deposit [] to United Realty . . . of \$4,000.00 by check[.]" The Respondent signed the Contract.

The Claimant also testified that the Respondent requested money from him for appraisals and a deposit on the purchase of a property. According to the Claimant, he gave the Respondent a number of signed, but otherwise blank, checks. Claimant #2 includes copies of seven checks

that have been deposited by the Respondent, or someone working with the Respondent, into a single account. The total amount of the checks is \$11,402.50. The checks show the following:

| <u>DATE</u> | <u>PAY TO</u> | <u>AMOUNT</u> | <u>MEMO</u> |
|-------------|-------------------|---------------|----------------------|
| 05-13-09 | Respondent | \$1,000.00 | Blank |
| 05-30-09 | Veronica Arteoga | \$ 800.00 | Blank |
| 10-09-09 | Rotana Roman | \$3,000.00 | Deposit |
| 11-02-09 | Milton Chavez | \$ 850.00 | Favor Juan Carlos R. |
| 03-27-10 | Juan Carlos Roman | \$1,000.00 | E.M.D. |
| 05-20-10 | Respondent | \$2,752.50 | E.M.D. |
| 05-20-10 | Respondent | \$2,000.00 | E.M.D. |

Claimant #3 is an "Escrow Letter" on United Realty of Fairfax, LLC, letterhead. The letter, dated May 19, 2010, is signed by the Respondent, as Manager of United, and states:

"[Claimant] Mrs. Marcia Vasquez and Mrs. Flor Melgares have deposited the amount of Ten Thousand Nine Hundred Two and 50/100 dollars (\$10,902.50) in our Escrow account."⁷

When asked whether he had given the Respondent more than \$10,902.50, the Claimant testified that he gave "Roman" \$1,000.00 in cash. The Claimant identified Mr. Roman as "the one who was showing me the houses." According to the Claimant, Mr. Roman told him he needed the money in cash because "immigration had picked up one of his sons and he wanted to borrow money for a bond." The Claimant testified that he knew this was not related to the purchase of a house, but a "loan" that Mr. Roman promised to pay back but has not.

The Claimant also testified that he never purchased a house because "I was left without any money." He testified that the Respondent was "supposedly" helping to get a loan to purchase a house through a friend of his. According to the Claimant, the Respondent agreed to return his money, if he were not able to purchase a property. The Claimant testified that he tried

⁷ "Flor Melgares" is the Respondent's wife. The record does not identify the relationship between Mrs. Vasquez and the Respondent.

several times to contact the Respondent personally and by telephone to get his money back, but when he went to the addresses for the real estate company that he was given, "nothing was there" and when he telephoned the Respondent no one answered the calls.

The Claimant testified that after he filed the claim, he met with Respondent, and they signed two agreements in which he promised to withdraw his claim in return for the Respondent's promise to pay him two different amounts of money. Claimant ## 4 and 5 are "Settlement Agreement[s]." Both notarized agreements are signed by the Claimant and Respondent on March 29, 2011. In both agreements, the parties acknowledge that the Claimant has filed a claim with the MREC, and they request that the MREC dismiss "the case against [the Respondent]." In one agreement (Claimant #4), the Respondent agrees to return \$20,000.00 to the Claimant in installments of varying amounts for twenty-three months beginning on April 20, 2011. The other agreement (Claimant #5) is identical to the first, except that the Respondent agreed to pay the Claimant "an undisclosed sum but at least Eleven Thousand Four Hundred Dollars (\$11,400.00)." The Respondent agreed to pay this full amount "immediately." The Claimant testified that the Respondent has not paid him any money.

When asked why the Respondent had agreed to pay him \$20,000.00 when "he owed less than \$11,000.00," the Claimant testified, "Because supposedly the State of Maryland was going to take him to court and they not want to do this. I told them this not possible. It [sic] illegal to give me the money. They said what they going to show Maryland was the other one to avoid jail. I don't know."⁸

⁸ I found the Claimant to have been a trustworthy witness. However, whether due to the quality of the translation or, more likely, the Claimant's limited cognitive and verbal skills, the Claimant's testimony often was not clear.

A claimant must prove three elements to establish a compensable actual loss under Section 17-404(a)(2): (i) an act or omission that occurs in the provision of real estate brokerage services by a licensed real estate broker, associate real estate broker, real estate salesperson, or unlicensed employee of a licensed real estate broker, (ii) that involves a transaction related to real estate in Maryland, and (iii) that results in the acquisition of money or property by theft, embezzlement, false pretenses, or forgery or that constitutes fraud or misrepresentation. For the following reasons, I shall find that the Claimant has suffered an actual loss of \$11,402.50.

An Act or Omission by a Licensed Real Estate Broker

The Claimant testified that the Respondent represented himself as a licensed real estate agent in Maryland. G.F. #3 shows that the MHIC had licensed the Respondent as a real estate salesperson from February 2009 through February 8, 2011.

The Claimant also testified that the Respondent, or someone working with the Respondent, showed him properties for sale in Maryland and asked him for money for appraisals and a down payment on the purchase of a property. Claimant ##1, 2, 3, and 7 and G.F. # 8 partially corroborate the Claimant's testimony. Claimant #1 is a sales contract that the Respondent signed as a licensed agent of United in October 2009. Claimant #2 includes the Claimant's checks that the Respondent, or a cohort, deposited into a single account. The Respondent signed Claimant #3 as the Manager of United acknowledging more than \$10,000.00 had been placed in United's escrow account for a deposit on a property in Silver Springs. Claimant #7 is a release agreement that the Respondent signed as "Supervising Manager for the Buyer's [listed as the Claimant] Agent" in July 2010. G.F. # 8 is a letter from United acknowledging that the Respondent had been employed as a salesperson there.

The Claimant also testified that the Respondent, and his associates, "beginning around March 2009," contacted him about the purchase of a house and began to show him "many" houses in Maryland. On October 5, 2009, the Claimant signed, as "purchaser," a sales contract for a property in Maryland, and the Respondent signed the contract as an agent for United, listed as the selling company. Claimant #1. Moreover, as discussed above, on May 19, 2010, the Respondent signed an escrow letter as the Manager of United. The letter indicated that Respondent had deposited \$10,902.50 in an escrow account to "be applied as down payment towards the purchase of the property on reference." Claimant #3.

Based on the evidence discussed above, I find that the Respondent was licensed in Maryland as a real estate salesperson and provided real estate brokerage services to the Claimant.

Acts Related to Properties in Maryland

The Claimant testified that the Respondent assisted him to obtain financing for the purchase of a house. This testimony is partially corroborated by G.F. ## 5 and 6, which are notices, one from WestStar Mortgage, Inc., and the other from Bank of America indicating pre-approval for loans on two properties in Maryland. Based on this evidence, and the evidence discussed in the preceding subsection, I find that the Respondent provided real estate brokerage services to the Claimant related to real estate located in Maryland.

Acquisition of Money by Bad Acts

The Claimant testified that the Respondent, or someone working for the Respondent, told him that he could purchase a house for the amount that he had been paying for rent. The Claimant also testified that the Respondent asked him for money to be used to purchase a property. The Respondent reported to the Claimant that he had deposited almost \$11,000.00 in United's escrow account for the Claimant. The Claimant testified that he gave the Respondent

the checks for appraisals and closing. Those checks, totaling \$11,402.50, were deposited into a single account.

The Claimant also testified that the Respondent promised to return the money the Claimant had given to him, if he did not purchase a house. The Claimant testified that he never purchased a property, but the Respondent did not return any money to him. Mr. Mehta, the Broker at United, reported to the MREC that, although the Respondent had been affiliated with United during the relevant time, United had no knowledge of any transaction with the Claimant, stating in G.F. #8: “[N]o contract or money pertaining to this case was ever turned in to United Realty International.”

“Misrepresentation” means “[t]he act of making a false or misleading assertion about something, usu. with the intent to deceive.” Black’s Law Dictionary 1022 (8th ed. 2004). Based on the evidence discussed above, I find that the Respondent obtained money from the Claimant through misrepresentation related to the purchase of property in Maryland.

I agree with the Fund’s argument that the evidence supports finding that the Respondent used misrepresentation about the purchase of a property in Maryland to obtain money from the Claimant.⁹ The Claimant testified that he gave checks to the Respondent in response to the Respondent’s request for money to be used toward the purchase of a house. Claimant #2 shows that the Respondent, or his cohorts, deposited \$11,402.50 worth of the Claimant’s checks into a bank account from June 2009 to May 2010. The Respondent told the Claimant in May 2010, that he had deposited \$10,902.50 in United’s escrow account “as down payment towards the purchase of the property [in Silver Spring].” Broker Mehta reported that was not true. The Claimant’s undisputed testimony was that he never purchased a property or, despite his requests,

⁹ I do not address any specific argument made by the Claimant because the Claimant did not address Section 17-404 during his argument.

had his deposit money returned by the Respondent. Accordingly, I find that the Respondent engaged in misrepresentation when he obtained \$11,402.50 from the Claimant through misleading and false statements that the money would be used for the purchase of a property or returned to him if no property was purchased.

The Fund also argues that the record supports a finding of theft by the Respondent. Under Section 17-404(a), a claimant may recover from the Fund upon proof that a licensed real estate salesperson obtained money "by theft, embezzlement, false pretenses, or forgery; or [by an act or omission] that constitutes fraud or misrepresentation." (Emphasis supplied). As a general rule, the use of the disjunctive term "or" in a statute establishes a relationship of contrast. *County Council of Prince George's County v. Dutcher*, 365 Md. 399, 418, 780 A.2d 1137, 1149 (2001). Because I have found that the Respondent's conduct constituted misrepresentation, there is no need to also analyze whether the Respondent's actions constituted theft.

CONCLUSIONS OF LAW

I conclude the following:

- A. The Claimant suffered an actual loss as a result of the Respondent's misconduct. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2), (3) (2010).
- B The Claimant is entitled to compensation from the Guaranty Fund in the amount of \$11,402.50. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a); 17-419(a) (2010).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Real Estate Commission **ORDER** the following:

- A. The Claimant's claim in the amount of \$11,402.50 is **ACCEPTED**.
- B. The Guaranty Fund shall pay \$11,402.50 to the Claimant.

C. The Respondent shall reimburse the Guaranty Fund the full amount paid to the Claimant, plus annual interest of at least ten percent.

D. If applicable, the Respondent's license is suspended. The Guaranty Fund shall not reinstate or reissue a license to the Respondent until (i) he repays in full the amount paid by the Guaranty Fund to the Claimant, plus interest, and (ii) he applies to the MREC for reinstatement or reissuance of a license.

E. The records and publications of the Maryland Real Estate Commission shall reflect its final decision.

SIGNATURE ON FILE

June 5, 2012
Date Decision Mailed

Michael D. Carlis
Administrative Law Judge

MDC/ch
132301

**IN THE MATTER OF THE CLAIM OF
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EXHIBIT LIST

The following were admitted for the Claimant:

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The following were admitted for the Fund:¹⁰

- G.F. #1: Documents related to notices of hearing sent to the parties (including a signed certificate, showing the Respondent's receipt of the notice);
- G.F. #2: Transmittal, with attachment;
- G.F. #3: Documents related to the Respondent's licensing history;

¹⁰ G.F. ## 1-4 were pre-labeled by the MREC Fund as REC GP1-4, and I relabeled them G.F. ##1-4.

G.F. #4: Complaint and Claim, with attachments;

G.F. #5: Letter dated October 5, 2009, from J. Amarillo to the Respondent and M. Vasquez;

G.F. #6: Memorandum dated May 19, 2010, from C. Montero at Bank of America;

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