

BEFORE THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM *
OF DENNIS BRODERICK, *
CLAIMANT *

CASE NO. 2019-RE-176

v. *

OAH NO. DLR-REC-22-19-03975

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

* * * * * * * * * * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated July 15, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 21st day of August, 2019, hereby **ORDERED**:

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

B. That the Conclusions of Law in the recommended decision be, and hereby are, **APPROVED**.

C. That the Recommended Order in the recommended decision be, and hereby is, **ADOPTED** and **AMENDED** as follows:

ORDERED that once this Proposed Order becomes a Final Order and all rights to appeal are exhausted, the Claimant, **Dennis Broderick**, be reimbursed

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

- On pages 2-3 of the recommended decision the ALJ identifies exhibits including:
 - GF Ex. 1, the Hearing Order, which is dated January 28, 2019, not February 1, 2019;
 - GF Ex. 3, Respondent's licensing history, which is dated April 18, 2019, not March 14, 2019; and
 - Resp. Ex. 1, letter from Respondent's brother and sister-in-law, which is dated April 23, 2019, not April 22, 2019.

from the Maryland Real Estate Guaranty Fund in the amount of **Six Thousand Two Hundred Seventy Nine Dollars (\$6,279.00)**;

ORDERED that all real estate licenses held by the Respondent, **David Herbst**, shall be suspended from the date this Proposed Order becomes a Final Order and all rights to appeal are exhausted and shall not be reinstated until the Maryland Real Estate Guaranty Fund is reimbursed, including any interest that is payable under the law and application for reinstatement is made;

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

E. Pursuant to Annotated Code of Maryland, State Government Article § 10-220, the Commission finds that the recommended decision of the Administrative Law Judge required modification because it omitted from the Recommended Order that Respondent's license be suspend until the Maryland Real Estate Guaranty Fund (and any interest) is repaid and included a minor typographical error.

F. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.09 those parties adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of the Order to file written exceptions to this Proposed Order. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202. If no written exceptions are filed within the twenty (20) day period, then this Proposed Order becomes final.

G. Once the Proposed Order becomes final, the parties have an additional thirty (30) days in which to file an appeal to the Circuit Court for the Maryland County in which the Appellant resides or has his/her principal place of business, or in the Circuit Court for Baltimore City.

MARYLAND REAL ESTATE COMMISSION

SIGNATURE ON FILE

August 21, 2019
Date

By: _____

SIGNATURE ON FILE

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| <p>IN THE MATTER OF THE CLAIM</p> <p>OF DENNIS BRODERICK,</p> <p>CLAIMANT</p> <p>v.</p> <p>THE MARYLAND REAL ESTATE</p> <p>COMMISSION GUARANTY FUND</p> <p>FOR THE ALLEGED MISCONDUCT</p> <p>OF DAVID HERBST,</p> <p>REAL ESTATE BROKER,</p> <p>RESPONDENT</p> | <p>* BEFORE LORRAINE E. FRASER,</p> <p>* ADMINISTRATIVE LAW JUDGE,</p> <p>* THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH CASE No. DLR-REC-22-19-03975</p> <p>* MREC COMPLAINT No. 19-RE-176</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> |
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RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
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CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On September 23, 2018, Dennis Broderick (Claimant) filed a claim against the Maryland Real Estate Commission (REC) Guaranty Fund (Fund) for monetary losses allegedly incurred by the Claimant as a result of the misconduct of David Herbst (Respondent), a licensed real estate broker, in providing property management services to the Claimant for real property located at Mariners Watch, Unit 404, Ocean City, Maryland (the Property).

On January 28, 2019, the REC issued an Order for Hearing. On February 4, 2019, the REC transmitted the matter to the Office of Administrative Hearings (OAH) for a hearing on the Claimant's claim against the Fund.

On April 23, 2019, I conducted a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2018). The Claimant represented himself. The Respondent represented himself. Shara Hendler, Assistant Attorney General for the Department of Labor, Licensing and Regulation (DLLR), represented the Fund.

The Administrative Procedure Act, the procedural regulations of the DLLR, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); Code of Maryland Regulations (COMAR) 09.01.02, 09.01.03, 09.11.03.02; and COMAR 28.02.01.

ISSUES

The issues are whether the 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, what is the amount of the loss.

SUMMARY OF THE EVIDENCE

Exhibits

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

- GF Ex. 1 Hearing Order, 2/1/19
- GF Ex. 2 Notice of Hearing, 2/13/19
- GF Ex. 3 The Respondent's licensing history, 3/14/19

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

- Cl. Ex. 1 Statement from the Respondent, 4/10/18

- Cl. Ex. 2 Check from the Respondent to the Claimant for \$2,470.00, 8/1/18, returned for insufficient funds, 8/15/18
- Cl. Ex. 3 Notice from Bank of America to the Claimant regarding check returned for insufficient funds, 8/15/18
- Cl. Ex. 4 Check from the Respondent to the Claimant for \$2,482.00, 8/21/18, returned for insufficient funds, 9/4/18
- Cl. Ex. 5 Notice from Bank of America to the Claimant regarding check returned for insufficient funds, 9/4/18
- Cl. Ex. 6 Statement from the Respondent, 8/1/18

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

- Resp. Ex. 1 Letter from the Respondent's brother and sister-in-law, 4/22/19
- Resp. Ex. 2 Medical information from Anna T. Monias, M.D., Gilchrist Greater Living at Broadmead
- Resp. Ex. 3 Medical information from Anna T. Monias, M.D., Greater Baltimore Medical Center
- Resp. Ex. 4 Sinai Driving Evaluation and Training Program Recommendations and Follow up, 2/4/19
- Resp. Ex. 5 Driver's License Suspension, 2/8/19
- Resp. Ex. 6 Reporting Officer Narrative, Ocean City Police Department, 9/10/18; Case Supplemental Reports, 11/21/18 and 12/20/18
- Resp. Ex. 7 Notice of foreclosure sale of the Respondent's property located at 7802 Coastal Highway, Ocean City, Maryland, 21842
- Resp. Ex. 8 Notice of Intent to Foreclose on the Respondent's property located at 7804 Coastal Highway, Ocean City, Maryland, 21842

Testimony

The Claimant testified.

The Respondent testified.

The Fund presented no testimony.

FINDINGS OF FACT

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

1. The Claimant is the owner of the Property, a condominium unit located in Ocean City, Maryland.
2. At all times relevant to this case, the Respondent was a licensed real estate broker who provided property management services, handling the rentals of condominium units in Ocean City, Maryland.
3. Since 2015, the Claimant and the Respondent entered into an annual rental agreement for the Respondent to act as the exclusive rental agent for the Claimant.
4. Under the agreement, the Respondent collected rental payments and deposits from tenants on behalf of the Claimant. The Claimant paid the Respondent commissions for weekly rentals the Respondent obtained.
5. The Respondent obtained tenants and collected rent for the following weeks on behalf of the Claimant: July 14 through 21, 2018; July 21 through 28, 2018; August 4 through 11, 2018; August 11 through 18, 2018; and August 18 through 25, 2018.
6. After subtracting the Respondent's commissions, the Claimant should have received \$1,235.00 per week for July 14 through 21, 2018 and July 21 through 28, 2018; \$2,780.00 per week for August 4 through 11, 2018 and August 11 through 18, 2018; and \$1,700.00 per week for August 18 through 25, 2018. The total due to the Claimant for the rentals was \$9,730.00 ($\$1,235.00 + \$1,235.00 + \$2,780.00 + \$2,780.00 + \$1,700.00 = \$9,730.00$).
7. The Respondent remitted \$3,475.00 to the Claimant.
8. For the rentals, the Respondent still owes the Claimant \$6,255.00 ($\$9,730.00 - \$3,475.00 = \$6,255.00$).

9. The Respondent sent the Claimant two checks in August 2018, which were both returned by the Claimant's bank for insufficient funds. The Claimant's bank charged \$12.00 for each returned check for a total of \$24.00.

10. The Respondent owes the Claimant a total of \$6,279.00 (\$6,255.00 = \$24.00 = \$6,279.00).

DISCUSSION

The burden of proof at a hearing on a claim against the Fund is on the "claimant to establish the validity of the claim." Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2018). Section 17-404 of the Business Occupations & Professions article governs all claims brought against the Fund and sets forth the following criteria that must be established by a claimant to obtain an award:

(a)(1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.

(2) A claim shall:

(i) be based on an act or omission that occurs in the provision of real estate brokerage services by:

1. a licensed real estate broker;
2. a licensed associate real estate broker;
3. a licensed real estate salesperson; or
4. an unlicensed employee of a licensed real estate broker;

(ii) involve a transaction that relates to real estate that is located in the State; and

(iii) be based on an act or omission:

1. in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or
2. that constitutes fraud or misrepresentation.

(b) The amount recovered for any claim against the Guaranty Fund may not exceed \$50,000 for each claim.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a), (b) (2018). *See also* COMAR 09.11.01.14.

The Claimant in this case testified and submitted documents showing that the Property was rented through the Respondent during the weeks of July 14 through 21, 2018; July 21 through

28, 2018; August 4 through 11, 2018; August 11 through 18, 2018; and August 18 through 25, 2018. The Claimant also submitted evidence showing the total amount he was owed and the partial payments he received from the Respondent. In addition, the Claimant submitted the notices from his bank showing the two checks from the Respondent that were returned for insufficient funds. The evidence shows the Respondent owes the Claimant \$6,279.00.

The Respondent testified that he had a number of strokes that affected his memory and now has dementia. He submitted documentation regarding his medical condition. He stated that he did not intentionally take money from his customers and apologized. However, he could not explain what happened to the money he owed the Claimant. Further, the Respondent has not paid the Claimant the money he owes him as of the date of the hearing.

The Fund argued that the Respondent agreed to collect money on behalf of the Claimant and disburse those funds to the Claimant but that he failed to do so. The Fund maintained that the Respondent's failure to disburse all the funds collected to the Claimant constituted a misrepresentation. The Fund recommended an award to the Claimant of \$6,279.00.

Therefore, I find the Claimant is entitled to an award from the Fund in the amount of \$6,279.00 for his actual loss based on the Respondent's misrepresentation in the provision of real estate services.

CONCLUSIONS OF LAW

Based on the above Findings of Fact and Discussion, I conclude as a matter of law that the Claimant sustained an actual loss compensable by the Fund due to an act or omission of the Respondent in which money was obtained on behalf of the Claimant but not remitted in full to the Claimant, which constitutes misrepresentation in the provision of real estate services. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2) (2018). I further conclude as a matter of law that the Claimant is entitled to receive an award from the Fund in the amount of \$6,279.00. *Id.*; COMAR 09.11.01.14.

RECOMMENDED ORDER

I **PROPOSE** that the Claim filed by the Claimant against the Maryland Real Estate Guaranty Fund be **GRANTED** in the amount of \$6,279.00.

July 15, 2019
Date Decision Issued

LEF/kdp
181031

SIGNATURE ON FILE

Lorraine E. Fraser
Administrative Law Judge

STATE OF TEXAS

COUNTY OF _____

GRANT OF _____

SIGNATURE ON FILE

DATE _____