

IN THE MATTER OF THE CLAIM OF

JOHN C. HAGELIN,

CLAIMANT,

v.

THE MARYLAND REAL ESTATE

COMMISSION GUARANTY FUND

FOR THE ALLEGED MISCONDUCT OF

SUE ANN WILLISTON, LICENSED

REAL ESTATE SALESPERSON,

RESPONDENT

* BEFORE MICHAEL D. CARLIS,

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE

* OF ADMINISTRATIVE HEARINGS

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* OAH CASE No.: DLR-REC-22-12-11556

* MREC COMPLAINT No.: 12-RE-018GF

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RECOMMENDED DECISION

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STATEMENT OF THE CASE

On July 25, 2011, John C. Hagelin (Claimant) filed a claim for compensation from the Maryland Real Estate Commission (MREC) Guaranty Fund (Fund).¹ The Claimant sought \$6,400.00 plus interest for an actual loss allegedly caused by Sue Ann Williston's (Respondent)

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

misconduct in the provision of real estate brokerage services.² The claim states:

I own a house at 5673 Pebble Drive, Frederick, MD 21703. I decided to rent that property and I hired West Patrick Property Solutions to be the property management company. West Patrick Property Solutions collected the security deposit worth one month rent. Tenant also sent West Patrick Property Solutions one month rent in advance. Lease started in June 2010 through present. I did receive the rent less fees and other costs from West Patrick until March 2011. I have not received rent checks for March and April 2011. Then, all of a sudden, I was told in May that West Patrick Property Solutions was dissolving from [the Respondent], even though she's been telling me that the checks were in the mail for several months before. The tenants have supplied me with copies of their cancelled checks.³

[I am owed the following]

- 1) Security Deposit (\$1,600 + interest that should have been accruing in the Escrow account)
- 2) Rent for the months of March 2011 and April 2011 (\$1,600 x 2 + \$3,200)
- 3) Additional Months Rent paid in advance by the tenant (\$1,600 + interest in Escrow account*)

* I am assuming that the advanced rent received by West Patrick Property Solutions should have been deposited in an escrow account for the tenant and incurring [sic] interest for them.

[Total Claim] \$6,400 rent + interest for tenant.

² "Provide real estate brokerage services" is:

- (1) 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.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(1) (2010).

³ These checks were not offered at the hearing.

On March 7, 2012, the MREC ordered a hearing on the claim. On March 9, 2012, the MREC transferred the matter to the Office of Administrative Hearings (OAH) to conduct the hearing.

On May 22, 2012, the OAH convened a hearing in Frederick, Maryland. The Claimant represented himself. The Respondent did not appear.⁴ Kris M. King, Assistant Attorney General, and the Office of the Attorney General, represented the MREC Fund.

The Administrative Procedure Act, the Department's procedural regulations, 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); COMAR 09.01.02, 09.01.03, and 09.11.03; 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 Claimant.

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant offered no exhibits.

The following were admitted for the Fund:

⁴ On April 18, 2012, the Respondent received the OAH's Notice of Hearing, with the MREC's Order of Hearing attached. Therefore, the Respondent received proper notice of the hearing. See Code of Maryland Regulations (COMAR) 28.02.01.05; COMAR 09.01.02.05. On November 22, 2011, pursuant to a consent order issued by the MREC, the Respondent agreed "not to contest Guaranty Fund claims submitted by Complainants." The Claimant was one of many individuals who filed complaints against the Respondent with the MREC.

- G.F. 1: Notice of Hearing with certified mail receipts;
- G.F. 2: Affidavit of Steven Long;
- G.F. 3: The Respondent's licensing history;
- G.F. 4: MREC Complaint and Guaranty Fund Claim; and
- G.F. 5: Report of Investigation, with attachments.

Testimony

The Claimant testified for himself. Haemi Kim Park, the Claimant's wife, also testified for the Claimant.

Jack L. Mull, Jr., Investigator, testified for the Fund.

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 registration number 527749. The Respondent was the sole owner and operator of West Patrick Property Solutions (WPPS), LLC.⁶
2. On February 10, 2010, the Claimant and Respondent executed a Property Management and Exclusive Rental Agreement (Management Agreement). By this Management Agreement, the Respondent agreed to lease and manage the Claimant's residential property in Frederick, Maryland (Property).
3. The Management Agreement entitled the Respondent to a leasing and set-up fee of 100 percent of the first month's full rent for a one year lease of the Property. The Management

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).

⁶ A licensed real estate broker was affiliated with WPPS. However, she had no authority or control over, or knowledge of, WPPS' financial accounts. The Respondent owned and maintained full control over the management, operation, and financial accounts of WPPS.

Agreement also entitled the Respondent to a property management fee equal to the greater of \$80.00 or ten percent of the total gross rents collected in one month.

4. The Management Agreement authorized the Respondent to collect rent, a security deposit, and other funds related to the Property. The Management Agreement also obligated the Respondent to provide an accounting of all funds collected and disbursed under the Management Agreement and promptly to pay the Claimant for any monies due under the Management Agreement.
5. On June 11, 2010, the Respondent executed a Residential Dwelling Lease For Maryland (Residential Lease) with Clark and Joyce W. (Tenants). The Tenants agreed to pay \$1,600.00 per month as rent on the Property and a security deposit of the same amount.
6. The Respondent collected and remitted rent to the Claimant each month until March 2011. The Respondent did not remit the rent to the Claimant for March and April 2011.
7. In March, April, and May 2011, the Claimant and Ms. Park talked to the Respondent about her failure to remit the March and April rent. The Respondent offered excuses and implied that the remittances would be made.
8. The Respondent collected the security deposit and an extra month's rent from the Tenant.
9. In May 2011, the Respondent informed the Claimant that she was dissolving WPPS.
10. The Claimant hired a different management company to manage the Property. The Respondent has not remitted the March or April 2011 rent payments to the Claimant or accounted for the Tenants' security deposit and extra month's rent.
11. On July 25, 2012, the Claimant filed a claim with the MREC Guaranty Fund for \$6,400.00 and interest.

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). The burden is by a preponderance of the evidence. COMAR 09.01.02.16.

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

§ 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.

See also COMAR 09.11.03.04.

COMAR 09.11.01.18 provides:

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.

Summary of the Evidence

The Claimant testified that he hired WPPS "to provide property management" for the Property.

The record includes the Management Agreement, which is dated and signed by the Claimant on February 9, 2010. By the terms of the Management Agreement, the Claimant appointed WPPS as the exclusive leasing and property management agent with authority to rent the Property for one year, beginning on February 9, 2010, and to collect a security deposit and other funds related to the Property. The Management Agreement authorized WPPS to offer the Property for rent at a negotiable rate of \$1,800.00 per month and obligated the Claimant to pay WPPS a leasing and set-up fee of 100 percent of the first month's full rent on a twelve to sixteen-month lease. The Management Agreement also obligated the Claimant to pay WPPS a property management fee of the greater of \$80.00 or ten percent of the total gross rent collected in one month.

The record includes the Lease Agreement. The Respondent found tenants for the Property in June 2010. The Tenants signed the Lease Agreement on June 11, 2010, and the Respondent signed it for the Claimant on July 11, 2010. The Lease Agreement set the rent for the Property at \$1,600.00 per month and required a security deposit of \$1,600.00.

The Claimant testified that the Respondent has never remitted the Tenants' rent for March and April 2011. According to the Claimant's testimony, when he asked the Respondent about the missing rent for March 2011, the Respondent said there had been a "snag" in some paperwork and she was retaining a new accountant. The Claimant also testified that, when he asked about the missing rent for April 2011, the Respondent told him that it had been mailed.

The Claimant testified that he and Ms. Park “confronted” the Respondent about the missing remittances for the March and April’s rent in May 2011. According to the Claimant, the Respondent said she was “dissolving the business.”⁷

The Claimant also testified that the Tenants told him that they had paid March and April’s rent to the Respondent. The Claimant additionally testified that the Respondent never claimed during any of the discussions about the rents that the Tenants had not paid them. The Claimant testified as follows related to the source of his knowledge that the Tenants had paid the rents:

Q. Did [the Respondent] acknowledge that she had received rents for March and April 2011?

A. Not to me.

Q. Do you know if she ever acknowledged that to anyone?

A. Well, it’s possible.

Q. Well, I’m asking you if you know.

A. If I know?

Q. Yes. In other words, no one else told you that she had acknowledged it, correct?

A. I don’t recall.

Q. So, your information that she had received the rent payments for March and April would be based on what the tenants told you.

A. Right, and the receipts that the tenants supplied us.

In regard to the two receipts that are part of the record, the Claimant acknowledged on cross-examination that they do not indicate that the Tenants paid rent for March and April 2011:

Q. Can you point to any documentation that shows receipt of the March or April payments for 2011?

⁷ The Claimant acknowledged that he was paid for May’s rent.

A. I can not from the documentation that is here.

The record includes a letter to the Claimant from the Tenants, dated June 3, 2011. The letter states as follows:

A receipt showing double payment for January 2011 is enclosed. No one to my knowledge has refuted the fact that this payment was made. The extra money (\$1600) was supposed to be put in escrow, and used as a buffer for future payments.

The timeline is:

- 1) In June 2010 we paid a prorated payment covering June 26 to the end of June, a one month security deposit (\$1600), and payment for July through December.
- 2) In January 2011 we paid \$1660 for January rent. We also paid an additional \$1540 to create an escrow account of \$1600. This escrow account is to be used in case of late payment other rent payment or other rent payment problem. (Receipt attached).
- 3) Monthly payments have been made from January to current.

To sum up; we have \$1600 in escrow to our credit, and we have \$1600 in security deposit going to our credit.

Because of the change in rental management and associated legal activity, I thought it best to recognize and permanently record the escrow account now. Please present this letter to your lawyer and tell him/her that we need the credit recognized.

Ms. Park was asked whether the Respondent told her at the May 2011 "confrontation" meeting that the Tenants paid rent in March and April. She testified:

She did not specifically say that she collected. However, she did indicate to us at that time, for the first time, that she was dissolving; that she is working with her lawyers; and that her lawyers will be contacting us to provide us with the rents that were due plus the security deposit and that we should be looking at other companies to become our rent property managers.

Ms. Park also testified that, before March 2011, the Respondent regularly sent the Tenants' rent to the Claimant and her. Furthermore, Ms. Park testified that the Respondent never denied receiving the Tenants' rent for March and April during any discussions with her. Finally,

Ms. Park testified that during a walk-through of the Property, apparently some time in May 2011, the Respondent said she “wanted to make it right” and was “working to make sure” the money was paid.⁸

Analysis

The Fund recommended an award of \$6,080.00.⁹ This amount includes (i) the rent for March and April 2011, minus the management fee (\$3,200.00 – \$320.00 = \$2,880.00), (ii) the Tenants’ payment of one month’s extra or advanced rent of \$1,600.00, and (iii) the security deposit of \$1,600.00.

The Fund addressed in argument whether the security deposit and extra rent should be included in the Claimant’s actual loss. The Fund argued that the Respondent “clearly had those funds at some point” and, when the Management Agreement ended, neither the Respondent nor WPPS retained any right to those funds. “That would mean,” the Fund continued, that either the landlord/Claimant or Tenants were entitled to the funds. The Fund took the position that the Respondent has the present legal right to the \$3,200.00 based on the Lease Agreement, although the Tenants may have a “future legal right” to the funds. The Fund explained:

If we assume for a moment that the Respondent had the funds and they don’t go to the [Claimant] and they don’t go to the [Tenants]. If, in fact, at the end of the lease that money is to be returned by the [Claimant] to the [Tenants], it would seem to me that would be a loss by the [Claimant] because he would now have to pay \$1,600.00 to the [Tenants] under the lease, and it is money that would be remaining in possession of [the Respondent].

None of the facts is disputed. Accordingly, I find that the Respondent collected rent from the Tenants for March and April 2011. This finding is based on the Claimant’s testimony that the Tenants told him they paid the rent; the Management Agreement that authorized the Claimant

⁸ Mr. Mull testified that his investigation consisted only of a review of documents. The documents are part of the record and are attachments to Mr. Mull’s report. Mr. Mull did not interview the Claimant or Respondent.

⁹ The Claimant agreed that the Respondent was entitled to a management fee. The management fee for March and April’s rent was \$320.00. Therefore, the Claimant agreed with the Fund’s recommendation of an award of \$6,080.00.

to collect rent and the Residential Lease that required the Tenants to pay rent; the Respondent's history of regularly remitting the rent to the Claimant before March 2011; and the Claimant's and Ms. Park's testimony that, during discussions about the rent with the Respondent, she never denied that the Tenants paid them and led the Claimant and Ms. Park to believe that the rent would be forwarded to them. I also find based on the Claimant's testimony, that the Respondent never remitted those rents to him. From these facts, I infer that the Respondent stole the rent payments. For the following reasons, however, I disagree that the total amount of that loss is \$2,880.00.

The Claimant agreed with the Fund that his actual loss based on the rent for March and April 2011 was \$2,880.00 because the Respondent was entitled to retain a management fee of ten percent, or \$320.00 for those two months. However, under the Management Agreement, the Respondent was also entitled to a leasing and set-up fee equal to "100% of the first (1st) month's full rent due and paid by the Tenant." Therefore, the Claimant's actual loss for the rent, after both deductions, is \$2,613.34 ($\$1,600.00 \text{ (rent)} \times 2 = \$3,200.00 - 10\% \text{ of } 3,200.00 \text{ or } \$320.00 - 1/6^{\text{th}} \text{ of } \$3,200.00 \text{ or } \$266.66^{10} = \$2,613.34$).

The Management Agreement authorized the Respondent to collect a security deposit, maintain the security deposit in a trust account, and to return the security deposit to the tenant at the end of the lease. Under the Residential Lease, the Tenants were required to pay a security deposit of \$1,600.00. The record includes a receipt, signed by the Respondent, acknowledging the Tenant's payment of the \$1,600.00 security deposit. Based on this evidence, I also find that the Respondent collected a security deposit of \$1,600.00 from the Tenants. Furthermore, based on the Claimant's testimony, I find that the Respondent did not transfer the security deposit to

¹⁰ This represents a pro rata amount of two months worth of the leasing and set-up fee.

the Claimant upon the termination of their management relationship. I infer from these facts that the Respondent stole the security deposit.

The Management Agreement also authorized the Respondent to collect and deposit other funds related to the Property in a trust account. The record includes a receipt that indicates the Respondent collected an additional \$1,600.00 from the Tenants in January 2011. The Tenants described this payment as a "buffer for future payments." Based on this evidence, I find that the Respondent collected an extra \$1,600.00 in January 2011 from the Tenants. Furthermore, based on the Claimant's testimony and the Tenants' letter, I find that the Respondent did not return this payment to the Tenants or transfer it to the Claimant upon the termination of their management relationship. I infer from these facts that the Respondent stole the extra rent.

The Fund took the position that the Respondent's failure to return the security deposit and extra payment constitutes an actual loss. I defer to the Fund's reasonable interpretation of the law it is authorized to enforce and for the following reasons. A security deposit protects a landlord against nonpayment of rent and damage to the leased property. *See Md. Code Ann., Real Prop. § 8-203(a)(3) (2010)*. At the end of a tenancy, a landlord must return the security deposit to the tenant or use the security deposit to compensate for unpaid rent or to repair damage to the rental property. *See Md. Code Ann., Real Prop. § 8-203(e), (f) (2010)*. The Respondent also collected and was charged with holding in a trust the extra payment made by the Tenants. At the end of the management relationship, the Claimant became responsible to the Tenants for those funds. The Respondent's failure to return the funds is a financial loss to the Claimant. Therefore, I conclude that the Claimant has proved a total actual loss of \$5,813.34 (\$2,613.34 (rent) + \$1,600.00 (security deposit) + \$1,600.00 (extra rent) = \$5,813.34).

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 \$5,813.34. 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 for reimbursement from the Fund is **ACCEPTED**.

B. The Guaranty Fund shall pay \$5,813.34 to the Claimant.¹¹

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 and not contrary to the relevant Consent Order, 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) she 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.

August 17, 2012
Date Decision Mailed

SIGNATURE ON FILE

Michael D. Carlis
Administrative Law Judge

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¹¹ The Claimant's claim for interest as part of actual loss is rejected. Neither the relevant statute nor regulation provides for interest as part of actual loss, and, when asked, the Claimant was not able to identify what amount of interest is claimed.