

THE MARYLAND REAL ESTATE COMMISSION **FINAL ORDER**

IN THE MATTER OF * BEFORE NANCY E. PAIGE, **OCT 31 2012**
 THE CLAIM OF * ADMINISTRATIVE LAW JUDGE
 KENNETH TROUT, CLAIMANT * OF THE MARYLAND OFFICE OF **MARYLAND REAL ESTATE COMMISSION**
 V. * ADMINISTRATIVE HEARINGS
 THE MARYLAND REAL ESTATE *
 COMMISSION GUARANTY FUND * OAH NOS: DLR-REC-22-12-12299
 FOR THE ALLEGED MISCONDUCT *
 OF SUE ANNE WILLISON, * MREC NO: 2012-RE-042 G.F.
 REAL ESTATE BROKER *
 * * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated August 7, 2012, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 26th day of September, 2012,

ORDERED,

- A. That the Findings of Fact in the Recommended Decision be, and hereby are, AFFIRMED;
- B. That the Conclusions of Law in the Recommended Decision be, and hereby are, APPROVED;
- C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;

and,

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

MARYLAND STATE REAL ESTATE COMMISSION

SIGNATURE ON FILE

September 26, 2012
Date

By: Marla S. Johnson
Marla S. Johnson, Commissioner

IN THE MATTER OF THE CLAIM OF: * BEFORE NANCY E. PAIGE,
KENNETH TROUT, * AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND REAL * OF THE MARYLAND OFFICE
ESTATE GUARANTY FUND, * OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED MISCONDUCT * OAH No. DLR-REC-22-12-12299
OF SUE ANN WILLISON * REC No. 2012-RE-042 GF

* * * * *

RECOMMENDED DECISION

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RECOMMENDED ORDER

STATEMENT OF THE CASE

On August 12, 2011, Kenneth Trout (Claimant) filed a claim with the Maryland Real Estate Guaranty Fund (Fund), established by the Maryland Real Estate Commission (REC), for reimbursement of actual losses in the amount of \$4,831.61, suffered as a result of the alleged misconduct by Sue Ann Willison (Respondent), a licensed real estate salesperson at relevant times. On March 9, 2012, the REC transmitted the case to the Office of Administrative Hearings (OAH) for a contested case hearing.

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

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

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

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

- Cl. #1. August 1, 2009 Property Management and Exclusive Rental Agreement
- Cl. #2. December 7, 2010 Residential Dwelling Lease for Maryland
- Cl. #3. January 31, 2011 Housing Assistance Payments Contract
- Cl. #4. May 9 through June 20 2011 email correspondence between Claimant and Respondent

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

- GF #1. April 11, 2012 Notice of Hearing with attached certified mail receipts
- GF #2. March 9, 2012 Transmittal by DLLR REC to OAH
- GF #3. August 8, 2011 Complaint and Guaranty Fund Claim
- GF #4. May 1, 2012 REC Professional License History
- GF #5. March 12, 2012 Affidavit of Steven Long
- GF #6. December 14, 2011 REC Report of Investigation, with eight attached exhibits.

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

Testimony

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

FINDINGS OF FACT

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

1. At all times relevant to this matter, the Respondent was a licensed real estate salesperson.
2. The Respondent's license was terminated on June 28, 2011 and revoked on November 22, 2011.
3. On or about September 9, 2009, the Claimant and Respondent, in her capacity as agent of West Patrick Property Solutions, a Frederick, Maryland-based company she had created, entered into a Property Management and Exclusive Rental Agreement (the Management Agreement). The Management Agreement directed the Respondent to rent, lease, operate and manage the Claimant's investment property located at 1135 Young Place in Frederick (the Property). The Claimant also signed a Third Party Authorization notice allowing the Respondent to act on his behalf in servicing the water and sewer account for the Property.
4. On or about January 1, 2010, the Respondent entered into a Residential Dwelling Lease (the Lease) with a tenant (the Tenant) for the Property. Pursuant to the Lease, the Tenant paid a security deposit of \$1,500.00 and rent at \$1,500.00, through May 2010.
5. The Tenant's rent was subsidized by the Frederick County Housing Authority (FCHA). FCHA also paid the Tenant's water and sewer bill to the Respondent.

6. Pursuant to the Management Agreement, the Respondent was entitled to a leasing fee plus compensation for management services at the rate of 8% of all gross rentals collected on the Claimant's behalf.
7. The Claimant paid the Respondent's leasing fee.
8. The Respondent failed to remit to the Claimant his share of the Tenant's rent for the months of April and May 2010.
9. The Respondent also failed to return the Tenant's security deposit. The Tenant has not claimed the return of the deposit from the Respondent.
10. The Respondent failed to forward water and sewer charges paid to her by FCHA in the amount of \$334.61.
11. The Respondent entered into a Consent Decree on November 22, 2011, in which she admitted, *inter alia*, that she had violated § 17-322(b)(22) of the Business Occupations and Professions Article, by failing to account for or submit funds to various complainants, including the Claimant, and agreed, *inter alia*, to the revocation of her license and not to contest the claims of various complainants, including the Claimant, against the Fund.

DISCUSSION

A person may recover compensation from the Fund for an actual loss based on an act or omission that occurs in the provision of real estate brokerage services by a licensed real estate broker or licensed real estate salesperson that involves a transaction related to real estate located in the State. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(i), (ii) (2010). For misconduct to be compensable, the act or omission must constitute either theft, embezzlement, false pretenses, forgery, fraud or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(2)(iii), 17-402(c) (2010); COMAR 09.11.03.04. At a hearing concerning a claim against the Fund, the

burden of proof shall be on the claimant to establish the validity of the claim. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2010). The REC shall order payment of a claim by the Fund for the actual monetary loss, up to \$25,000, suffered by the claimant. Md. Code Ann., Bus. Occ. & Prof. § 17-410(a), (b) (2010).

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

The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund, pursuant to Business Occupations and Professions Article, Title 17, Subtitle 4, Real Estate Guaranty Fund, Annotated Code of Maryland, shall be restricted to the actual monetary loss incurred by the claimant, but may not include monetary losses other than the monetary loss from the originating transaction. Actual monetary losses may not include commissions owed to a licensee of this Commission acting in his capacity as either a principal or agent in a real estate transaction, or any attorney's fees the claimant may incur in pursuing or perfecting the claim against the guaranty fund.

Two categories of acts or omissions may give rise to an actual loss. In the first, money or property is obtained by a licensee by theft, embezzlement, false pretenses or forgery. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(iii)(1). The second category involves a licensee's act or omission that constitutes fraud or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(iii)(2); COMAR 09.11.03.04B(1).

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

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

...

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

...

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

- (1) for consideration, providing any of the following services for another person:
 - (i) selling, buying, exchanging, or leasing any real estate; or
 - (ii) collecting rent for the use of any real estate;

...

(m) *Real estate*.-

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

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

The essential facts in this proceeding are not in dispute. The Claimant executed a property management and leasing agreement with the Respondent to lease and manage the Claimant's Property. The Respondent secured a tenant for the Claimants' Property and also entered a lease agreement with the Tenant to collect rent including water and sewer charges. The Tenant's rent was subsidized by the FCHA, which also paid water and sewer charges as part of the rent.

The evidence established that in the months of April and May 2011, the Respondent collected \$1,500.00 in rent payments from the Tenant, but failed to remit any portion to the Claimant in each of those months, as required by the Management Agreement. The evidence also establishes that the Claimant paid \$334.61 in outstanding water and sewer charges in response to a turn-off notice. While the Claimant was unable to testify specifically as to whether the FCHA had paid those charges to the Respondent, there is no contrary evidence, and since the FCHA had routinely paid a portion of the Tenant's rent, including water and sewer charges, I infer that it had paid the outstanding charges to the Respondent, but the Respondent had failed to pay the water and sewer bill.

The Respondent admitted that her failure to account for or pay amounts due to the Claimant violated § 17-322(b)(22) of the Business Occupations and Professions Article, and the

evidence is consistent with that admission. There is no dispute that the Respondent was a licensed real estate salesperson at relevant times and that the transactions in question involved real estate brokerage services. Md. Code Ann., Bus. Occ. & Prof. § 17-101(a) (2010). The Respondent's actions amount to theft of the Claimant's money, and he is therefore entitled to compensation from the Fund for his actual loss. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(2), 17-402(c) (2010); COMAR 09.11.03.04.

Amount of Actual Loss

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

In this case, the Claimant seeks to recover \$4,834,61.00. That amount includes two months' rent (\$3,000.00), the security deposit not returned to the Tenant (\$1,500.00) and the outstanding balance of the water and sewer bills paid by the Claimant (\$334.61).

The Fund did not object to paying the Claimant the full rental amount, without deduction of the 8% management fee provided for in the Management Agreement, on the theory that, in view of her theft of the funds, the Respondent had not earned the compensation. While that logic may be appropriate in a contract action, I do not find that the 8% management fee is part of the

Claimant's actual loss. Therefore, I conclude that the Claimant is only entitled to recover \$1,380.00 for each of the months in which the Respondent failed to remit the rent payments, for a total of \$2,760.00 for those months. I also conclude that the Claimant is entitled to the \$334.61 he paid for water and sewer charges due and unpaid.

The Claimant also seeks to recover the full amount of the \$1,500.00 security deposit that the Tenant paid. The security deposit was to indemnify the Claimant against damage to the Property and for monies not paid by the Tenant, and was to be kept in escrow for those purposes. There is no evidence that the Tenant has claimed reimbursement of the security deposit (the evidence is that the Tenant has since died, but her rent was paid in substantial part by FCHA); nor is there evidence as to what, if any, repairs the Claimant was required to make when the Tenant moved out. To the extent there is any liability in regard to the deposit, however, the Claimant is the responsible party and it is clear that the Respondent had no claim to the deposit. I therefore conclude that the Claimant is entitled to recover the amount of the deposit from the Fund.

Accordingly, I conclude that the Claimant is entitled to reimbursement from the Fund in the amount of \$4,594.00.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Facts and Discussion, I conclude that the Claimant is entitled to reimbursement from the Real Estate Guaranty Fund in the amount of \$4,594.00 for actual losses resulting from the Respondent's theft. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(2)(iii)(1), 17-410(b)(1) (2010); COMAR 09.11.01.18; 09.11.03.04.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, I hereby

RECOMMEND that the Maryland Real Estate Commission:

ORDER that the Claimant's claim against the Maryland Real Estate Guaranty Fund be **ACCEPTED** in the amount of \$4,594.00; and that it further,

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

August 7, 2012
Date Decision Mailed

NEP/
136456

SIGNATURE ON FILE

Nancy E. Paige
Administrative Law Judge