

THE MARYLAND REAL ESTATE COMMISSION

FINAL ORDER

IN THE MATTER OF THE CLAIM * BEFORE LORRAINE E. FRASER,
 OF CHERYL SMILER * ADMINISTRATIVE LAW JUDGE
 AGAINST THE MARYLAND REAL * OF THE MARYLAND OFFICE OF
 ESTATE COMMISSION GUARANTY * ADMINISTRATIVE HEARINGS
 FUND FOR THE ALLEGED * OAH No: DLR-REC-22-11-30548
 MISCONDUCT OF ANNIE L. BURTON* REC CASE NO: 2010-RE-117
 -BYRD

JUN 04 2012

MARYLAND REAL ESTATE COMMISSION

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated February 9, 2012, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 22nd day of March, 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

Date 3/22/12

SIGNATURE ON FILE
 By: [Signature]
 Anne S. Cooke, Commissioner

IN THE MATTER OF THE CLAIM OF
CHERYL SMILER,

CLAIMANT,

V.

THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND FOR
THE ALLEGED MISCONDUCT OF
ANNIE L. BURTON-BYRD, REAL
ESTATE BROKER,
RESPONDENT

* BEFORE LORRAINE E. FRASER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH CASE No. DLR-REC-22-11-30548
* MREC COMPLAINT No. 2010-RE-117
*
*
*
*
*

* * * * *

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 September 10, 2009, Cheryl Smiler (Claimant) filed a complaint with the Maryland Real Estate Commission (MREC) and a claim against the Maryland Real Estate Commission Guaranty Fund (Fund). The claim was for monetary losses allegedly incurred by the Claimant as a result of the misconduct of Annie L. Burton-Byrd, Licensed Real Estate Salesperson (Respondent), in providing real estate brokerage services to the Claimant for the real property located at 6120 Allentown Road, Suitland, Maryland.

On June 28, 2011, MREC transmitted the matter to the Office of Administrative Hearings (OAH) for a combined hearing regarding the regulatory charges against the Respondent and the Claimant's claim against the Fund. On August 29, 2011, the OAH scheduled a hearing for November 22, 2011 and sent Hearing Notices to the Claimant, the Respondent, and MREC. On September 21, 2011, Salvatore E. Anello, III, Esquire, entered his appearance on behalf of the Respondent. On October 13, 2011, MREC revoked the delegation of authority for the OAH to hear the regulatory charges against the Respondent because she is no longer licensed in Maryland. On October 21, 2011, Mr. Martin mailed additional copies of the August 29, 2011 notice of the hearing, the May 23, 2011 Statement of Charges and Order for Hearing, and the October 13, 2011 revocation of authority to Mr. Anello and the Respondent by certified and regular mail. The Respondent's mail was sent to the following address: 6250 St. Regis Circle #102, Raleigh, North Carolina 27606. Both the Respondent's and Mr. Anello's certified mail receipts were returned signed. On October 25, 2011, Mr. Anello notified Mr. Martin that neither he nor the Respondent were planning to attend the November 22, 2011 hearing. Thus, I find that the Respondent and her attorney were properly notified of the hearing and had actual notice of the hearing.

On November 22, 2011, I conducted a hearing at the Largo Government Center, 9201 Basil Court, Largo, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2010). The Claimant was present and was represented by John M. G. Murphy, Esquire. Peter Martin, Assistant Attorney General for the Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Respondent and her representative did not appear.

The Administrative Procedure Act, the procedural regulations of the DLLR, 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

(1) Did the Claimant sustain an actual loss as a result of an act or omission of the Respondent that constitutes theft, embezzlement, false pretenses, forgery, misrepresentation, or fraud?

(2) If the Claimant sustained an actual loss, what is the amount of actual loss compensable by the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Fund Ex. 1 Two Notices of Hearing (one certified, one regular mail), dated 8/29/11, with attached copies of Statement of Charges and Order for Hearing; both returned by the U.S. Post Office: "Return to Sender, Not Deliverable as Addressed, Unable to Forward."
- Fund Ex. 2 Letter to Peter Martin, Office of the Attorney General, from Salvatore E. Anello, III, counsel for the Respondent, dated 9/21/11
- Fund Ex. 3 Memorandum to Sandra Sykes, OAH, from Mr. Martin, dated 10/13/11, revoking the delegation for the OAH to hear the regulatory charges because the Respondent is no longer licensed in Maryland.
- Fund Ex. 4 Letter to Mr. Anello, from Mr. Martin, dated 10/21/11, with attachments, with a copy to the Respondent sent to a North Carolina address; signed certified mail receipts from the Respondent and Mr. Anello
- Fund Ex. 5 Letter to Mr. Anello from Peter Martin, dated 10/26/11, with a copy to the Respondent sent to the North Carolina address; signed certified mail receipts from the Respondent and Mr. Anello
- Fund Ex. 6 Certification by Katherine Connelly, Executive Director, MREC, dated 11/16/11; the Respondent's licensing information

Fund Ex. 7 District Court of Maryland Case Information for the Respondent

Fund Ex. 8 Letter to the Respondent from Ms. Connelly, dated 9/14/09, with an attached copy of the written claim and complaint

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

- Claimant Ex. 1 Exclusive Buyer/Tenant Broker Agreement, dated 8/14/07
- Claimant Ex. 2 Contract of Sale, dated 9/6/07; General Addendum, dated 9/6/07; Second Addendum dated 9/13/07; Third Addendum dated 10/17/07; Fourth Addendum dated 10/19/07
- Claimant Ex. 3 Contract of Sale, dated 10/31/07; General Addendum, dated 11/26/07, General Addendum dated 12/17/07; First Addendum, dated 12/27/07
- Claimant Ex. 4 Escrow Agreement, dated 12/31/07
- Claimant Ex. 5 Letter to Robert Biddle from Thomas Moore, dated 1/9/09, re: Equity Advantage accounting record; Cash Flow Report 1/1/91 – 1/3/08
- Claimant Ex. 6 E-mails between the Respondent and the Claimant, dated 2/11/08, requesting the return of the Claimant's escrow money
- Claimant Ex. 7 Release of Obligation and Release of Deposit Agreement created under Contract of Sale, dated 8/26/08
- Claimant Ex. 8 Records of escrow account for Signature Group Properties LLC at The Harbor Bank of Maryland, dated 7/31/07 - 3/31/08
- Claimant Ex. 9 M & T Bank records for Signature Group Properties LLC and The Signature Group of Baltimore LLC
- Claimant Ex. 10 documents related to the Claimant's complaint against the Respondent and other defendants filed in the Circuit Court for Prince George's County
- Claimant Ex. 11 Motion for Summary Judgment filed in the Circuit Court for Prince George's County, 11/2/09
- Claimant Ex. 12 Order Entering Summary Judgment in the Circuit Court for Prince George's County, dated 6/23/10

No exhibits were offered on behalf of the Respondent.

Testimony

The Claimant testified on her own behalf. No testimony was offered on behalf of the Respondent or the Fund.

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, registration number 05 614582, working for Signature Group Properties, LLC.
2. Sometime in August or September 2007, the Claimant engaged the services of the Respondent to act as her real estate agent in acquiring commercial real property in Maryland.
3. On September 6, 2007, the Claimant, as Principal of Locke Investments, LLC, entered into a Contract of Sale to purchase real property known as 6120 Allentown Road, Suitland, Maryland 20746 (the property). The Respondent acted as the Claimant's agent. The seller was Kwen Lee Cheung.
4. The property was subject to a ground rent that the seller was attempting to buy, which would then allow the seller to convey the property in fee simple to the Claimant, as provided in the Contract of Sale.
5. Pursuant to an Addendum to the Contract of Sale, on October 17, 2007, the Claimant agreed to deposit \$35,500.00 to be held in escrow by Signature Group Properties, LLC.
6. As a result of the difficulties the seller was having obtaining clear title to the property, a number of addendums were attached to the September 6, 2007 Contract of Sale. In addition, a second Contract of Sale was entered into between the Claimant and the seller on October 31, 2007, to which a number of addendums were also attached. Among other things, the addendums extended the closing date a number of times.

7. On December 31, 2007, the Claimant, the seller, and Signature Group Properties, LLC, entered into an escrow agreement. The Claimant agreed to deposit a down payment toward the purchase of the property in the amount of \$133,000.00 with Signature Group Properties, LLC, to be held in escrow pending closing on the property.
8. Between September 11, 2007 and December 31, 2007, the Claimant paid to the Respondent and Signature Group Properties, LLC, a total of \$179,618.95, to be held in escrow pursuant to the above-described agreements.
9. By February 2008, the seller had not obtained clear title to the property, the sale did not close and the contract of sale terminated.
10. On February 11, 2008, the Claimant asked the Respondent to return to her the \$179,618.95 the Respondent was holding in escrow.
11. On August 17, 2008, the Claimant signed and, on August 26, 2008, the seller signed a release of Obligation and Release of Deposit allowing the Respondent and Signature Group Properties, LLC, to return all of the funds held in escrow to the Claimant.
12. The Respondent never returned to the Claimant any of the \$179,618.95 held in escrow.
13. On June 23, 2010, the Circuit Court for Prince George's County entered a judgment against the Respondent, her husband Kevin E. Byrd, and Signature Group Properties, LLC, (defendants) in the amount of \$179,618.95, plus 10% interest per year. The court found that the defendants' failure to return the \$179,618.95 deposit to the Claimant constituted, among other things, constructive fraud.
14. As of the date of this hearing, the Claimant has not received any money from the Respondent, her husband Kevin E. Byrd, or Signature Group Properties, LLC.

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) (2010). Section 17-404(a) of the same statute governs all claims brought against the Fund and sets forth, in pertinent part, the following criteria that must be established by a claimant to obtain an award:

§ 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.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a), (b) (2010). *See* COMAR 09.11.03.04.

The MREC shall order payment of a valid claim from the Guaranty Fund for actual monetary losses suffered by a claimant not to exceed \$25,000. Md. Code Ann., Bus. Occ. & Prof. § 17-410(a), (b) (2010); COMAR 09.11.01.18.

The Claimant argued that she was entitled to the maximum award from the Fund, \$25,000.00. She asserted that she gave \$179,618.95 to the Respondent to hold in escrow and

that the Respondent used the money for her own operations. She cited the judgment in the Circuit Court for Prince George's County against the Respondent in the amount of \$179,618.95 and argued that collateral estoppel applied based on the court's findings.

The Fund agreed that collateral estoppel applied and that the court found constructive fraud and theft. The Fund agreed that the statutory maximum of \$25,000.00 should be awarded to the Claimant.

The parties in this case did not make a motion to dismiss on the grounds of collateral estoppel at the beginning of the hearing. Rather, the parties presented evidence on the merits of the case and then argued collateral estoppel in closing. Thus, while I agree collateral estoppel applies, it is just as judicially expedient to rule on the merits of this case.

The evidence presented by the Claimant is uncontested and overwhelmingly shows that the Respondent received from the Claimant \$179,618.95 to be held in escrow pending closing on the contract of sale for the Allentown Road property. The contract of sale terminated in February 2008 when the seller of the property could not obtain clear title and convey the property to the Claimant in fee simple. The Claimant requested that the Respondent return the \$179,618.95 to her in February 2008. The Respondent failed to do so. The Respondent's refusal to return the \$179,618.95 constitutes theft. Thus, I find that the Respondent obtained money from the Claimant in the course of providing real estate services for property located in Maryland and then stole the money. Therefore, the Claimant has suffered an actual loss as a result of the Respondent's act and is entitled to an award from the Fund. The Claimant's actual loss of \$179,618.95 far exceeds the maximum award allowed from the Fund. As a result, the Claimant is entitled to \$25,000.00 from the Fund.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Facts and Discussion, I conclude as a matter of law that the Claimant is entitled to reimbursement from the Real Estate Guaranty Fund in the amount of \$25,000.00, for actual losses resulting from the Respondent's actions. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(1), (2) and 17-410(b)(1) (2010); 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 \$25,000.00; and further,

That the Respondent shall be ineligible for any REC license until she reimburses the Fund for the full amount of the award paid to the Claimant by the Fund, plus annual interest of at least ten percent; and

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

February 9, 2012
Date Decision Mailed

SIGNATURE ON FILE

Lorraine E. Fraser
Administrative Law Judge

LEF/
129409