

THE MARYLAND REAL ESTATE COMMISSION

THE CLAIM OF JESSE	*	BEFORE MARLEEN B. MILLER,
MENDELSON, CLAIMANT	*	ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND REAL	*	OF THE MARYLAND OFFICE OF
ESTATE COMMISSION GUARANTY	*	ADMINISTRATIVE HEARINGS
FUND FOR THE ALLEGED	*	OAH NOS: DLR-REC-22-11-41101
MISCONDUCT OF JEAN C.	*	
TSAI, RESPONDENT	*	MREC NO: 2011-RE-164 G.F.
* * * * *	*	* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated July 12, 2012, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 15th day of August, 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

8/13/2012
Date

By Marla S. Johnson, Commissioner

IN THE MATTER OF THE CLAIM OF
JESSE MENDELSON,
CLAIMANT

v.

THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND,
FOR THE ALLEGED MISCONDUCT OF
JEAN C. TSAI,
RESPONDENT

* BEFORE MARLEEN B. MILLER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
* OAH CASE No.: DLR-REC-22-11-41101
* MREC COMPLAINT No.: 11-RE-164GF
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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 November 4, 2010, Jesse Mendelson (the Claimant) filed a claim (the Claim) for compensation from the Maryland Real Estate Commission (the Commission or MREC) Guaranty Fund (the Fund) for losses he allegedly incurred as a result of the acts and omissions of Jean C. Tsai (the Respondent) in the provision of real estate brokerage services.

On September 15, 2011, the Commission issued an Order for Hearing on the Claim against the Fund. The Commission transmitted the case to the Office of Administrative Hearings (OAH) on September 19, 2011.

On April 19, 2012, I conducted a hearing in this case at OAH's office in Wheaton, Maryland. The Claimant represented himself and Assistant Attorney General Hope Sachs represented the Fund. Despite proper notice, the Respondent failed to appear at the hearing or to request a postponement.¹ Pursuant to applicable law, I proceeded to hear the case in the Respondent's absence.²

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing, and Regulation, and OAH's 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

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; and if so, what amount of award, if any, is the Claimant entitled to receive from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted the following documents, which I admitted as the exhibits numbered below:

¹ On November 1, 2011, OAH sent notice of the April 19, 2012 hearing, by both certified and first class mail to the Claimant's address of record with the Commission and the Maryland Motor Vehicle Administration, 13934 Bergenfield Drive, North Potomac, Maryland 20878. (See Fund Ex. ## 2 & 3.) Although the United States Postal Service returned the certified mailing, the first class mailing was never returned to OAH as undeliverable.

² Section 17-324 of the Business Occupations Article provides that before the Commission can take any final action against an individual if that individual has been personally served with a hearing notice or the hearing notice or has been sent certified mail notice at least ten days prior to the hearing to the individual's last known business address. Md. Code Ann., Bus. Occ. & Prof. § 17-324(d) (2010). If the individual, after receiving proper notice of the hearing, fails or refuses to appear, the Commission may hear and determine the matter despite the individual's absence. Md. Code Ann., Bus. Occ. & Prof. § 17-324(f) (2010).

1. **Regional Sales Contract, dated May 21 2010**
2. **Notice to Buyer and Seller of Buyer's Rights and Seller's Obligations under Maryland's Single-Family Residential Property Condition Disclosure Law, dated May 18, 2010**
3. **MRIS Residential Short Listing for 8707 Post Oak Road in Potomac, Maryland, printed June 1, 2010, and Maryland Property Disclosure and Disclaimer Statement, signed by the Respondent on May 6, 2010 and by the Claimant on May 23, 2010**
4. **Castell Home Consultants, Inc. Inspection Report, dated June 2, 2010**
5. **Home Inspection Notice and/or Property Condition Paragraph Notice, unsigned and undated**
6. **Home Inspection Notice and/or Property Condition Paragraph Notice, signed by the Claimant on June 4, 2010 and by the Respondent on June 15, 2010**
7. **Letter to the Claimant from All Aspects Waterproofing, dated October 6, 2010**
8. **The Claimant's receipts from/contracts with All Aspects Waterproofing (8/29/10), Quality Fix & Build (10/11/10) and the Home Depot (10/5/10)**

The Fund submitted the following documents, which I admitted as the exhibits numbered below:

1. **Notice of Hearing and Order for Hearing sent to the Respondent and returned by the United States Postal Service as "attempted not known."**
2. **Affidavit of Steven Long, dated December 2, 2011**
3. **The Respondent's licensing history**
4. **The Claim, filed on November 4, 2010**

The Respondent submitted no documents for admission into evidence.
Testimony

The Claimant and his wife, Elena Mendelson, testified on behalf of the Claimant.

Neither the Respondent nor the Fund offered any testimony.

FINDINGS OF FACT

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

1. At all times relevant to this matter, the Commission licensed the Respondent as a Real Estate Salesperson³ under license number 05-638034 and she worked for Long and Foster's Potomac branch under broker Tim Harper. On September 9, 2010, the Respondent's license became inactive and, on February 25, 2012, the Respondent's license was terminated by the Commission.

2. On May 12, 2010, the Respondent multiple listed for sale her property located at 8707 Post Oak Road in Potomac, Maryland (the Property).

3. To conceal a serious and persistent water problem in the Property's basement from prospective buyers, at or around the time that the Respondent listed the Property, she painted a water damaged concrete masonry unit (CMU) block wall in the Property's basement with DryLok paint, which, for around six to eight weeks, seals walls from water intrusion. She also placed a dehumidifier in the basement.

³ 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). Providing real estate brokerage services includes the following:

(l) 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.

4. Three days after the Property was listed, the Claimant saw the listing, which noted that the Respondent was both the owner and the listing agent.

5. On Sunday, May 16, 2010, the Claimant and his wife first saw the Property. They observed that the basement had a musty smell, that there was a dehumidifier in the basement and that there appeared to be a fresh coat of paint on the concrete wall in the unfinished basement room. Because the Respondent was not present, they could not at that time inquire about the condition of the wall and any potential leaks or water damage.

6. On Friday, May 21, 2010, the Respondent; his agent, Long & Foster's Kira Epstein; and a relative, Edward Hammerman, Esquire, visited the house while the Respondent was present. In response to inquiries by the Claimant and Mr. Hammerman about the dehumidifier, the apparently newly painted wall and any associated water damage, the Respondent falsely informed them that there was no current water damage or leakage, that she had recently purchased the dehumidifier, that there had not been any water/moisture issue in the basement for a long time and that the wall had been painted a long time ago. The Respondent intended that the Claimant rely and the Claimant did rely on these false representations.

7. On May 23, 2010, the Respondent (as seller and listing agent) and the Claimant and his wife (as buyers) entered into a Regional Sales Contract (the Contract) for the purchase and sale of the Property for \$625,000.00. The Contract contained, among others, the following provisions/representations:

- The Contract was subject to a home inspection contingency;
- In answer to the question in the Maryland Property Disclosure and Disclaimer Statement as to whether the basement showed any leaks or

evidence of moisture, the Respondent replied, "Yes . . . clean and repair gutters, paint waterproof wall."

8. Upon seeing the Respondent's disclosure about the basement, the Claimant again asked her whether and to what extent there was or had been a water or moisture problem. The Respondent replied that no moisture/water problems had been experienced on the Property for many years, any problems had been fixed and the wall had been painted a very long time ago.

9. On June 2, 2010, Richard Castell of Castell Home Consultants, Inc. completed an inspection of the Property at the Respondent's request. The inspection report provided to the Claimant by Mr. Castell contained a boilerplate statement regarding "Basement or Crawlspace Moisture" and failed to report any specific issue regarding leakage, water or mold in the basement. The report did, however, contain a comment that the house sloped to the front and rear and that the grade at the foundation walls required correction since the rear patio was not draining properly.

10. On June 4, 2010, the Claimant formally requested by home inspection notice (the Notice) that the Respondent re-grade around the house, correct five other issues raised in the inspection report and provide a \$7,000.00 credit towards the Claimant's closing costs in lieu of correcting twelve other non-water-related issues raised in the inspection report.

11. When the Claimant's agent reached the Respondent four days later,⁴ the Respondent advised her that she was unwilling to do any work on the Property and would agree to only a \$1,000.00 credit towards the Claimant's closing costs.

12. After significant negotiations between the parties, on June 15, 2010, the parties agreed that the Respondent would provide a \$7,000.00 credit towards the Claimant's closing

⁴ The Contract's inspection contingency required the Respondent to respond within three days to the Claimant's demand for repairs or credits toward closing costs or be bound by the Claimant's demands, but the parties nevertheless negotiated after expiration of that period without a formal respond by the Respondent.

costs, in lieu of any and all items listed in the inspection report or the Notice, other than to replace the attic fan, to repair the blower door safety shut off, to install a filter, to service the entire air conditioning system and ductwork, and to move the humidifier ductwork away from the water cut-off valve.

13. Although the Claimant wanted a closing date in August, the Respondent insisted that settlement occur on June 22, 2010, falsely stating that she had a non-refundable airline ticket to Texas.⁵

14. The first time it rained after the closing was on June 27, 2010, when roughly one-quarter of an inch of rain fell in the Potomac area. A small amount of water appeared in the front corner of the unfinished basement room, right at the base of the newly-painted concrete wall. At the time, the basement did not smell, the walls appeared to be in good condition, and no water appeared anywhere else.

15. The next significant rainfall occurred on August 18, 2010, during which the Potomac area received approximately 1.14 inches of rain. Three large puddles appeared on the floor along that same front left wall, where the paint had been applied. The paint started to crack and bubble, revealing a swath of lime leaching through the concrete block foundation behind it - evidence of long-standing, and covered-up, water damage. Even with the de-humidifier running on high, twenty-four hours a day, seven days a week, mold started to grow on the *back* wall on the opposite side of the same room.

16. The Claimant immediately solicited three bids from basement waterproofing companies, and all three agreed that there had been recent water in the basement and that the

⁵ The Claimant stated in his Claim and testified at the hearing that, to make conversation at the closing, he asked the Respondent if she was ready to go to Texas and she appeared confused and then extremely uncomfortable, stating "uh no, um, my plans, uh, changed. I'll be staying with my friend in Potomac, then maybe return to Taiwan or somewhere else. I don't know yet." The Respondent did not appear at the hearing to refute this testimony.

water leakage and damage had existed for a *very* long time, including mold spores that the contractors located and identified in the water-logged walls.

17. The Claimant employed Jeff Basham, a certified basement waterproofing expert with All Aspects Waterproofing, who inspected the Property's basement on August 24, 2010. He used a moisture meter to measure the amount of moisture in the CMU block wall. The meter provided readings in the 80% range on the lower block and near 100% in the corners of the block wall, revealing water issues from hydrostatic pressure and the presence of water inside the cavities of the CMU block. Mr. Basham identified the paint on the basement wall was a very recent coat of DryLok paint, which is used to seal walls from water and which normally works for six to eight weeks. There was also rough casting in the corner of the wall, which is normally placed on walls in attempts to stop water. There was mold along the front and back wall of the residence, which is an indicator of water intrusion or high humidity. The wall of the front of the residence was wet to the touch and the window wells showed signs of water intrusion. Efflorescence⁶ was visible on sections of the exposed CMU block wall. It was clear from the inspection that water problem had existed for a long time. The consensus recommendation was to immediately install a waterproofing system in the basement.

18. Based on his inspection, Mr. Basham recommended that the Claimant immediately arrange for the following work

- Installation of a full perimeter, interior water management system (sub floor), with two sump pumps to manage and control the water.

⁶ "Efflorescence" is a white crystalline or powdery, often fluffy/fuzzy deposit on the surface of masonry materials like concrete, brick, clay tile, etc. It's caused by water seeping through the wall/floor/object. The water dissolves salts inside the object while moving through it, then evaporates leaving the salt on the surface.

- Bleeding out of the CMU block cavities to allow any water build up inside the cavities to drain into the sub floor waterproofing system (drain tile) and to travel to the sump pumps for discharge to the exterior of the residence.
- Installation of two window well taps to alleviate any build-up of water in the window wells.
- Treatment of the work area and walls with an anti-microbial, EPA approved mold biocide.

19. On September 1, 2010, All Aspects Waterproofing (Aspects) dug into the concrete floor and wall along the basement perimeter, in both the finished area and unfinished basement rooms. Aspects installed 125 feet of drain pipe, mirror drains along the base of the entire wall, two sump pumps, and poured the necessary amount of concrete. In the finished room, the new baseboards the Claimant had purchased and paid a contractor to install prior to the water intrusion, needed to be removed and replaced, and the room needed to be re-painted. The basement powder room needed a new toilet and new tile and grout since the old toilet needed to be dug out for installation of the drainage system. Finally, two electrical outlets needed to be installed for the two sump pumps.

20. The Claimant's costs to correct totaled \$10,593.00,⁷ which included the following:

- Waterproofing system, mold remediation, and installation of sump pumps
- \$8,700.00

⁷ I am unconvinced that the Claimant's purchase of a new toilet for the basement was necessitated by the correction any water/moisture problem and, therefore, have reduced the amount claimed to exclude the \$128.00 charge for that item.

- Tile and Grout - \$32.00
- Baseboard and window well box purchase and installation, installation of new outlets for the sump pumps, installation of toilet and tile in bathroom; painting and post-damage touch-up painting - \$1,843.00

21. Had the Respondent honestly revealed the situation in the Property's basement, the Claimant would have demanded the problems be fixed or he would not have purchased the Property.

22. The Respondent left no forwarding address and changed her email address and cell phone number shortly after closing on the Contract. Consequently, the Claimant could not locate her to discuss what, if anything, she was willing to do to compensate the Claimant for the costs of dealing with the moisture/mold/ waterproofing problems, which she had actively concealed from him.

23. On November 4, 2010, the Claimant filed his Claim against the Fund.

DISCUSSION

Section 17-404 of the Maryland Annotated Code's Business Occupations Article (the Business Occupations Article) 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. . .

COMAR 09.11.03.04 further provides, in pertinent part, as follows:

.04 Claims Against the Guaranty Fund.

A. A guaranty fund claim shall be based on the alleged misconduct of a licensee.

B. For the purpose of a guaranty fund claim, misconduct:

(1) Is an action arising out of a real estate transaction involving real estate located in this State which causes actual loss by reason of theft or embezzlement of money or property, or money or property unlawfully obtained from a person by false pretense, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit;

(2) Is performed by an unlicensed employee of a real estate broker or by a duly licensed real estate broker, associate broker, or salesperson; and

(3) Involves conduct for which a license is required by Business Occupations and Professions Article, Title 17, Annotated Code of Maryland.

The burden of proof is on the Claimant to establish, by a preponderance of the evidence, the validity of his Claim. Business Occupations Article § 17-407(e) (2010). For the following reasons, I conclude that the Claimant had met this burden.

It is undisputed that the Respondent was at all relevant times a licensed real estate salesperson. According to the Claimant, the Respondent told him that she primarily obtained her license to sell her home. In doing so, however, she subjected herself to far more responsibilities than the average seller. The applicable Code of Ethics expressly recognizes that a real estate agent owes an obligation to *all* parties to a real estate transaction, not just the agent's clients. See COMAR 09.11.02.02A. For example, Business Occupations Article § 17-532(c)(1)(iv) requires

a real estate salesperson to “treat all parties to the transaction honestly and fairly and answer all questions truthfully.”

Based on the above factual findings, the Respondent did not truthfully answer the Claimant’s inquiries regarding the condition of her basement. On at least two occasions, the Respondent responded to such inquiries that she had no water, mold or moisture problems in a very long time, once when the Claimant was viewing the Property and, again, when the Claimant saw the ambiguous disclosure in the Contract.

Maryland recognizes two distinct kinds of misrepresentation: fraudulent and negligent. Fraudulent misrepresentation requires the element of intent or *scienter*. *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 333 (1982), quoting *Cahill v. Applegarth*, 98 Md. 493 (1904). Negligent misrepresentation arises when one party owes a duty of care to another and negligently asserts a false statement. Both types of misrepresentation require the following:

- An intention that the statement will be acted upon;
- Knowledge that the recipient of the information will probably rely on the statement, which, if erroneous, will cause loss or injury;
- Justifiable reliance on the statement; and
- Damage proximately caused by misrepresentation.

Martens Chevrolet, 292 Md. at 337.

The Respondent’s statements and the circumstances surrounding them demonstrate that she intentionally misled the Claimant, intended that he rely on her statements, and recognized that he would be more likely to buy her house and incur damages if the serious and persistent water problems in the Property’s basement were concealed from him. She intentionally covered up the evidence of these problems and rushed the Claimant to settlement before time and/or a

heavy rain revealed her dishonesty. She also gave a false impression that she would remain available for contact by the Claimant if any issues arose, by providing an email address and cell phone number for future contact, than almost immediately changed both of them and provided the post office with no forwarding address.

Because of the duties of a real estate agent to all parties to the transaction, the fact that the Respondent had lived in the Property for a long time, and the Respondent's successful efforts to hide any water problems from the Claimant and his initial inspector, the Claimant justifiably relied upon the Respondent's statements. Consequently, he suffered proximate damages totaling \$10,593.00, which he should be allowed to recover from the Fund.

CONCLUSIONS OF LAW

I conclude that the Claimant suffered an actual loss as a result of the Respondent's intentional misrepresentation misconduct and is entitled to recover \$10,593.00 from the Fund. Business Occupations Article § 17-404; COMAR 09.11.03.04.

RECOMMENDED ORDER

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

1. The Maryland Real Estate Commission's Guaranty Fund Claim of Jesse Mendelson is **GRANTED**;
2. The Claimant, Jesse Mendelson, shall receive an award of \$10,593.00 from the Maryland Real Estate Commission's Guaranty Fund.
3. The Respondent, Jean C. Tsai, shall reimburse the Guaranty Fund the full amount paid to the Claimant, plus annual interest of at least ten percent.

4. 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.

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

July 12, 2012
Date Decision Mailed

SIGNATURE ON FILE
Marleen B. Miller
Administrative Law Judge

MBM/
135722

**IN THE MATTER OF THE CLAIM OF
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EXHIBIT LIST

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