

THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM * BEFORE STEPHEN J. NICHOLS,
OF BRENDA SMITH, * ADMINISTRATIVE LAW JUDGE
CLAIMANT, * OF THE MARYLAND OFFICE OF
AGAINST THE MARYLAND * ADMINISTRATIVE HEARINGS
REAL ESTATE COMMISSION *
GUARANTY FUND FOR THE * OAH NO: DLR-REC-22-13-35230
ALLEGED MISCONDUCT OF *
HARRY LEE WOLF * MREC NO: 2012-RE-244 G.F.
* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated January 28, 2014, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 19th day of February, 2014,

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

By: _____
Marla S. Johnson, Commissioner

2/19/14
Date

IN THE MATTER OF THE CLAIM

OF BRENDA SMITH

AGAINST THE MARYLAND REAL

ESTATE COMMISSION GUARANTY

FUND FOR THE ALLEGED MISCONDUCT

OF HARRY LEE WOLF, LICENSED

ASSOCIATE REAL ESTATE BROKER

*** BEFORE STEPHEN J. NICHOLS,**
*** AN ADMINISTRATIVE LAW JUDGE**
*** OF THE MARYLAND OFFICE**
*** OF ADMINISTRATIVE HEARINGS**
*** OAH NO.: DLR-REC-22-13-35230**
*** REC NO.: 2012-RE-244**

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On or about November 28, 2011, Brenda Smith (Claimant) filed a complaint with the Maryland Real Estate Commission (MREC) and, at the same time, filed a claim against the Real Estate Commission Guaranty Fund (Fund) for monetary losses incurred as a result of the alleged misconduct of Harry Lee Wolf (Respondent), a licensed associate real estate broker.

On August 13, 2013, after an investigation into the complaint, the MREC issued an Order for Hearing on the claim against the Fund. On October 1, 2013, the Office of Administrative Hearings (OAH) scheduled a hearing for January 8, 2014, at 9:30 a.m.

On January 8, 2014, the above-captioned case was heard before Stephen J. Nichols, Administrative Law Judge (ALJ), on behalf of the MREC. The hearing was conducted at the OAH located at 11101 Gilroy Road, Hunt Valley, Maryland. James H. Ostad, Esquire, and

Benjamin Sterling, Esquire, represented the Claimant. Hope M. Sachs, Assistant Attorney General, Office of the Attorney General, Department of Labor, Licensing & Regulation, represented the Fund. The Respondent failed to appear for the hearing.

The MREC's Order for Hearing named no one other than the Respondent as the person alleged to be responsible for the act or omission giving rise to the claim. During its investigation into the complaint, the MREC confirmed that the Respondent had died on July 25, 2011. The OAH had mailed notice of the hearing to the Respondent by certified and regular mail to his last business address on file with the MREC. At the same time, the OAH had mailed notice of the hearing to Gordon D. Fronk, Esquire, at the address of his law office. The notice listed the time, place, and date of the hearing. In a letter addressed to the MREC, dated December 5, 2011, and filed with the OAH on January 7, 2014, Mr. Fronk indicated that he was named in the Respondent's will as the Personal Representative of the Respondent's estate; however, the Respondent's will had not and would not be admitted to probate and Letters of Administration would not be obtained.¹ As no estate has been opened, and the Respondent is deceased, the ALJ determined that all notification requirements had been met and directed that the hearing proceed *in absentia*. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2010); Code of Maryland Regulations (COMAR) 09.01.02.05; COMAR 09.01.02.07.

The Administrative Procedure Act; the procedural regulations of the Department of Labor, Licensing and Regulation; 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. 2013); COMAR 09.01.02, COMAR 09.01.03, COMAR 09.11.03.02; COMAR 28.02.01.

¹ On January 7, 2014, Mr. Fronk filed a request for a postponement of the January 8, 2014 hearing stating that he represented the interests of two witnesses who had been subpoenaed to attend the hearing and he was unable to accompany the two witnesses to the hearing due to a schedule conflict. Mr. Fronk's December 5, 2011 letter to the

ISSUES

The issues are whether the Claimant sustained an “actual loss” compensable by the Fund as the result of an act or omission of the Respondent within the meaning of section 17-404(a) of the Business Occupations and Professions Article of the Annotated Code of Maryland, and if so, the amount of the award.

SUMMARY OF THE EVIDENCE

Exhibits

The Fund submitted the following exhibits that were admitted into evidence:

Fund Ex. #1 - October 1, 2013 Notice of Hearing with a copy of an August 13, 2013 Order for Hearing

Fund Ex. #2 - MREC licensing information on the Respondent

Fund Ex. #3 - Copy of a MREC Complaint and Guaranty Fund Claim form

The Claimant submitted the following exhibits that were admitted into evidence:

Claim Ex. #1 - Copy of a December 3, 2010 letter from the Claimant to the Respondent

Claim Ex. #2 - Copy of a Cashier's Check, Deposit Ticket, bank records, and copies of negotiated checks

Claim Ex. #3 - Copy of a Purchase and Sale Agreement

Claim Ex. #4 - Copy of a First Amendment to Purchase and Sale Agreement

Claim Ex. #5 - Copy of a Second Amendment to Purchase and Sale Agreement

Claim Ex. #6 - Copy of a Release of Obligations and Release of Deposit Agreement created under Contract of Sale

Claim Ex. #7 - Copies of a September 6, 2011 letter to the Claimant from Gordon D. Fronk, Esquire, printout of electronic mail, and a September 21, 2011 letter from the Farmers Insurance Group

MREC was part of the request for a postponement sent to the OAH by facsimile transmittal. The request for a postponement was not granted.

Claim Ex. #8 - Copies of a printout of electronic mail and two letters, dated September 9, 2011 and August 29, 2011, to Gordon D. Fronk, Esquire, from Joseph H. Ostad, Esquire

Claim Ex. #9 - Copies of two negotiated checks

Claim Ex. #10 - Copy of a MREC Complaint and Guaranty Fund Claim form with attached exhibits

Claim Ex. #11 - A December 20, 2013 letter under seal from Katherine F. Connelly, MREC, regarding the Respondent, with attachments

Claim Ex. #12 - A December 20, 2013 letter under seal from Katherine F. Connelly, MREC, regarding Alicia C. Wines, with attachments

Claim Ex. #13 - A MREC Report of Investigation with attachments

Claim Ex. #14 - Copy of a printout from the webpage of the Maryland Department of Assessments & Taxation

Claim Ex. #15 - Copies of certified bank records from the Wells Fargo Bank

Claim Ex. #16 - Copy of the affidavit of Alicia C. Wines, with attachments

Claim Ex. #17 - Copy of the affidavit of Cynthia Wolf, with attachments

No other exhibits were offered into the record.

Testimony

The Claimant testified in her own behalf and presented testimony from Vicky P. Kent.

The Fund did not present any witnesses.

FINDINGS OF FACT

After considering all of the testimony and exhibits, the ALJ finds, by a preponderance of the evidence, the following to be fact:

1. At all times relevant to this proceeding, the Respondent was actively engaged in providing real estate brokerage services trading as Harry Wolf Commercial, Inc. (HWC). HWC was a close corporation incorporated on January 16, 2008. Cynthia Wolf, the Respondent's spouse,

was HWC's sole stockholder. On February 6, 2008, Alicia C. Wines was licensed as the broker of record for HWC. On April 16, 2008, the Respondent was licensed as an associate real estate broker.² The Respondent was in charge of business operations at HWC.

2. During December 2010, the Claimant was interested in the possible purchase of real property located at 4339 Harford Road in Baltimore, Maryland (the property), in an effort to expand the restaurant business that she owned with her spouse. The Claimant and her spouse had previously become acquainted with the Respondent as a real estate broker/associate real estate broker while they had, in the past, been planning to sell their restaurant.
3. The Claimant engaged the Respondent as her real estate brokerage agent. The Respondent represented the Claimant as the buyer's agent in an offer to purchase the property.
4. On or about December 3, 2010, a letter of intent was signed by the Claimant, her spouse, and Thelma Grady (Seller), the owner of the property, for sale of the property at a purchase price of \$105,000.00. The letter of intent stated there was to be a deposit of \$10,000.00 and \$95,000.00 would be due to be paid to the Seller at the time of settlement. The letter of intent indicated that the deposit would be given to the Respondent, trading as HWC, and if the purchase offer was not accepted or if financing satisfactory to the Claimant could not be procured, the deposit money would be returned to her.

² "Associate real estate broker" means an individual:

(1) who meets the requirements for a real estate broker license under § 17-305 of this title but who applies for and is granted an associate real estate broker license under §§ 17-307 and 17-309 of this title; and

(2) who, under the associate real estate broker license, may provide real estate brokerage services on behalf of a licensed real estate broker with whom the associate real estate broker is affiliated.

Md. Code Ann., Bus. Occ. & Prof. § 17-101(c) (2010). Prior to April 4, 2006, the Respondent had been a licensed real estate broker.

5. On or about December 6, 2010, the Claimant personally handed a cashier's check in the amount of \$10,000.00, made payable to HWC, to the Respondent. The remitter specified on the cashier's check was Vicky Kent. Ms. Kent was a close friend and had loaned the \$10,000.00 to the Claimant in order to allow her to purchase the property.
6. On December 8, 2010, the Respondent deposited the \$10,000.00 cashier's check received from the Claimant into the HWC business operating account and not into an escrow account used solely for trust money.
7. On January 14, 2011, the Claimant and the Seller signed a Purchase and Sale Agreement (the contract) for sale of the property on terms consistent with the December 3, 2010 letter of intent. The terms of the contract provided that the Claimant would deposit \$10,000.00 into the HWC escrow account as earnest money to be held in trust for the purchase of the property. Settlement was scheduled on or before February 28, 2011. The contract also indicated that if financing acceptable to the Claimant could not be procured, the contract was null and void and the \$10,000.00 deposit would be returned to the Claimant.
8. The Claimant needed more time to obtain a loan from a financial institution in order to complete purchase of the property. On or about March 18, 2011, the Claimant and the Seller agreed to amend the contract and extend the settlement date until March 31, 2011.
9. After March 18, 2011, the Claimant and the Seller agreed to amend the contract a second time and to reduce the sale price for the property from \$105,000.00 to \$90,000.00.
10. While the Claimant was attempting to arrange financing, a title search revealed an \$80,000.00 lien on the property. The Claimant stopped efforts to obtain financing and decided not to complete the transaction.

11. On or about March 30, 2011, the Claimant notified the Respondent to terminate the contract and to return the \$10,000.00 deposit to her. When the Claimant spoke with him about the return of the \$10,000.00 deposit, the Respondent indicated to her that he would have to obtain a written release from the Seller before returning the \$10,000.00.
12. The Claimant did not complete the contract, and no settlement on the property took place.
13. The Claimant continued to make telephone calls to the HWC business office seeking information about the return of the \$10,000.00 deposit.
14. On or about June 9, 2011, the Claimant received a document the Respondent had drafted titled "RELEASE OF OBLIGATIONS AND RELEASE OF DEPOSIT AGREEMENT CREATED UNDER CONTRACT OF SALE." (Claim Ex. #6) The Respondent had previously instructed the Claimant to sign the release and return it to him and he would contact the Seller and obtain her signature on the document. The Claimant signed the release and returned it to the Respondent.
15. After the Claimant notified the Respondent to terminate the contract, the Respondent did not contact the Seller and ask her about the return of the \$10,000.00 deposit to the Claimant.
16. Sometime around the end of the first week in July 2011, the Claimant learned that the Respondent had been hospitalized. On July 25, 2011, the Respondent died.
17. The Respondent did not return the \$10,000.00 deposit to the Claimant before he died. Since the Respondent's death, the Claimant has not received a return of her \$10,000.00 deposit from any source.
18. On September 21, 2011, the Claimant repaid the loan she had obtained from Vicky Kent by paying her \$10,000.00 in the form of two checks. Ms. Kent negotiated and cashed both checks.

19. After the Respondent's death, HWC was insolvent, ceased business operations, and, subsequently, its corporate charter was forfeited. At the time of the Respondent's death, the HWC escrow account was empty.

DISCUSSION

The burden of proof at any 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) (Supp. 2013). Section 17-404(a) of the Business Occupations and Professions Article governs all claims brought against the Fund and sets forth criteria that must be established by the Claimant in order to obtain an award. In pertinent part, that section provides:

§ 17-404. Claims against Guaranty Fund.

(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.

Against the Guaranty Fund, provides:

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 licensed 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.

At all times relevant, the Respondent was a licensed associate real estate broker. The Respondent acted as the buyer's agent in the Claimant's attempt to purchase the property. The Respondent's activities fall within the definition of providing real estate brokerage services. Md. Code Ann., Bus. Occ. & Prof. § 17-101(l)(1), (3) (2010).³ The act(s) and omission(s) of the Respondent, complained of by the Claimant, relate to real estate located in Maryland. The Claimant has met the requirements of sections 17-404(a)(2)(i) and (ii) of the Business Occupations and Professions Article.

³ (l) "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;

...

(3) engaging regularly in a business of dealing in real estate or leases or options on real estate. . . .

For the instant claim to be successful against the Fund, the act(s) and omission(s) of the Respondent must also constitute one or more of six prohibited actions specified in section 17-404(a)(2)(iii) of the Business Occupations and Professions Article.

“The offense of embezzlement is complete whenever a person who has been entrusted with money or property forms an intent to convert it to his or her own use, and has possession with such intent.” 9 M.L.E. *Embezzlement* § 2, at 251 (2008). “The gravamen of the offense is that money or other property was entrusted to someone who stood in a fiduciary relationship with the owner, and the fiduciary fraudulently and willfully appropriated the property to a use other than that intended.” *State v. Burroughs*, 333 Md. 614, 622, 636 A.2d. 1009, 1013 (1994) (reversing a lower court ruling that had reversed an accountant and an insurance agent’s conviction for theft by deception and embezzlement by a fiduciary). “[Fiduciary capacity] is not restricted to technical or express trusts, but includes also such offices or relations as those of an attorney at law, a guardian, executor, or broker, a director of a corporation, and a public officer.” 9 M.L.E. *Embezzlement* § 3, at 252 (2008).

The statutory form of embezzlement involving fraudulent misappropriation by fiduciaries is currently codified at section 7-113 of the Criminal Law Article:

§ 7-113. Embezzlement -- Fraudulent misappropriation by fiduciary

(a) Prohibited. -- A fiduciary may not:

(1) fraudulently and willfully appropriate money or a thing of value that the fiduciary holds in a fiduciary capacity contrary to the requirements of the fiduciary's trust responsibility; or

(2) secrete money or a thing of value that the fiduciary holds in a fiduciary capacity with a fraudulent intent to use the money or thing of value contrary to the requirements of the fiduciary's trust responsibility.

Md. Code Ann., Crim. Law § 7-113(a) (2012).

To establish embezzlement it is necessary to show that the property belonged to someone other than the perpetrator, the perpetrator acquired the property lawfully, the perpetrator is properly deemed to have been in a fiduciary capacity with respect to the owner, and there was a misappropriation of the property by the perpetrator with fraudulent intent.

As her agent providing real estate brokerage services, the Respondent was in a fiduciary capacity with respect to the Claimant.⁴ The Respondent's fiduciary responsibilities with respect to the acquisition and holding of the Claimant's trust money are enforced by statutory requirements. Section 17-502(b) of the Business Occupations and Professions Article provides:

(b) (1) Except as otherwise provided in subsection (c) of this section, a real estate broker promptly, but not more than 7 business days after the acceptance of a contract of sale by both parties, shall deposit trust money in an account that is maintained by the real estate broker:

- (i) separately from the real estate broker's own accounts; and
- (ii) solely for trust money.

(2) A real estate broker may not use trust money for any purpose other than that for which it is entrusted to the real estate broker.

Md. Code Ann., Bus. Occ. & Prof. § 17-502(b) (2010). "A real estate broker shall maintain trust money in an account authorized under this Part I of this subtitle until . . . the real estate transaction for which the trust money was entrusted is consummated or terminated." *Id.* § 17-505(a)(1) (2010).

On December 8, 2010, two days after the Claimant personally handed the \$10,000.00 cashier's check to him, the Respondent deposited it into the HWC business operating account. (Finding of Fact #6) A copy of the deposit slip used by the Respondent to deposit the cashier's

⁴ "In accepting employment as an agent, the licensee shall protect and promote the interests of the client. This obligation of absolute fidelity to the client's interest is primary, but it does not relieve the licensee from the statutory obligations towards the other parties to the transaction." COMAR 09.11.02.02A (emphasis added).

check at the bank was submitted into evidence. Bank records of the HWC business operating account during the month of December 2010 are also in the record. The account number on the deposit slip for the cashier's check matches the account number of the HWC business operating account. Examples of checks written against the HWC business operating account at about the same time as the \$10,000.00 cashier's check was added include payroll checks. On December 9, 2010, a payroll check was issued from the HWC business operating account made payable to the Respondent in the amount of \$5,000.00. The sequence of deposits into the HWC business operating account and the checks issued against the account demonstrate there would have been insufficient funds to cover the Respondent's December 9, 2010 \$5,000.00 payroll check when it was issued against the account if the \$10,000.00 had not been added on December 8, 2010.

During the investigation into the complaint, a MREC investigator interviewed Alicia C. Wines, the broker of record for HWC. By the time of that interview, Ms. Wines had formed a new real estate company after the dissolution of HWC. The investigator reported that:

I asked [Ms. Wines] if the escrow account was transferred from the old company to the new company and she advised that it was empty. There was nothing to transfer. Mr. Fronk again advised that [the Respondent] had drained the account of all funds and that [Ms. Wines] was unaware of that fact until his death.

(Claim Ex. #13, p. 3)

Acting as the buyer's agent, the Respondent lawfully came into possession of the Claimant's \$10,000.00 deposit on the purchase of the property. The Respondent had no legal right to use any of the \$10,000.00 other than to deposit it in an escrow account used solely for trust money. The Respondent deposited the \$10,000.00 cashier's check received from the Claimant into the HWC business operating account and not into an escrow account. The Respondent violated his fiduciary duty by commingling the \$10,000.00 cashier's check with

other monies in the HWC business operating account; in doing so, the Respondent misappropriated the trust money with fraudulent intent for his own use.

When the Claimant notified the Respondent that she had changed her mind about completing the contract and asked for a return of the deposit, the Respondent failed to remit any of the \$10,000.00. The Respondent rightfully should have returned the \$10,000.00 deposit to the Claimant. The Respondent did not contact the Seller and seek her assent to a return of the \$10,000.00 deposit. Given the passage of time, and the attendant circumstances, the ALJ has drawn a reasonable and permissible inference that the Respondent misappropriated the \$10,000.00 to his own use with fraudulent intent and, once the contract was terminated, was unable to gather \$10,000.00 from some other source and pay the deposit back. The Respondent's hospitalization and demise finalized that outcome. The Claimant has established an embezzlement of her \$10,000.00 deposit and has met the requirement of section 17-404(a)(2)(iii) of the Business Occupations and Professions Article.

The Claimant has provided documentary and testimonial evidence to support the instant claim against the Fund and has met the required burden of proof. The Claimant suffered the loss of her \$10,000.00 deposit that the Respondent lawfully obtained while acting as the buyer's agent and then misappropriated to his own use with fraudulent intent. The Claimant, therefore, is entitled to reimbursement from the Fund for an actual loss in the amount of \$10,000.00.⁵

⁵ The Claimant's original claim against the Fund was for \$15,000.00. The November 28, 2011 Complaint and Guaranty Fund Claim form reads that the \$15,000.00 claim was based on "\$10,000 [return of Claimant's deposit] plus costs, interest, and attorney's fees." (Fund Ex. #3, p. 2) "The amount of compensation recoverable by a claimant from the [Fund] . . . 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 . . . any attorney's fees the claimant may incur in pursuing or perfecting the claim against the guaranty fund." COMAR 09.11.01.18 (emphasis added). The Claimant presented no evidence regarding her costs and attorney fees as those matters cannot be included in the calculation of her actual loss.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, the ALJ concludes, as a matter of law, that the Claimant has established an "actual loss" valued at \$10,000.00 as a result of embezzlement by the Respondent, a licensed associate real estate broker. Accordingly, the Claimant is entitled to prevail in her claim against the Fund in the amount of \$10,000.00. Md. Code. Ann., Bus. Occ. & Prof. § 17-404(a) (Supp. 2013); COMAR 09.11.03.04; COMAR 09.11.01.18.

RECOMMENDED ORDER

On the basis of the foregoing Findings of Fact, Discussion and Conclusions of Law, it is **RECOMMENDED** that the Maryland Real Estate Commission:

ORDER, that the Claimant be awarded the sum of \$10,000.00 from the Fund based on the claim filed on November 28, 2011 for actual losses sustained as a result of the misconduct of the Respondent; and that it further

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

January 28, 2014
Date Proposed Decision Issued

SIGNATURE ON FILE

Stephen J. Nichols
Administrative Law Judge

SJN/da
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