

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**MARYLAND REAL ESTATE
COMMISSION**

v.

KAY V. DEITZ

and

**THE CLAIM OF SHENESSE GOMES
AGAINST THE MARYLAND REAL
ESTATE COMMISSION GUARANTY
FUND**

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CASE NO. 2007-RE-485

**OAH CASE NO. DLR-
REC-24-07-47699**

OPINION AND FINAL ORDER

This matter came before the Commission for argument on Exceptions filed by the Respondent, Kay V. Deitz, to the Proposed Order of November 20, 2008. On September 29, 2008, Administrative Law Judge Marc Nachman (“ALJ”) filed a Proposed Decision in which he recommended that the Respondent’s license be suspended for thirty days and that the Respondent be assessed a civil penalty totaling \$3,000.00; that the Claimant be reimbursed \$5,300.00 from the Maryland Real Estate Guaranty Fund; and that the records and publications of the Maryland Real Estate Commission reflect that decision.

On November 20, 2008, the Maryland Real Estate Commission (“Commission”) issued a Proposed Order that affirmed the ALJ’s Findings of Fact, approved the ALJ’s Conclusions of Law; and adopted the ALJ’s Recommended Order. The Respondent filed Exceptions to that portion of the Proposed Order which would suspend the Respondent’s license for thirty days.

A hearing was held by a panel of the Commission consisting of Commissioners Anne S. Cooke, Nancy R. Simperts and Georgiana S. Tyler on March 18, 2009. Ms. Deitz did not appear at the scheduled time of the hearing. Jessica Berman Kaufman, Assistant Attorney General, represented the Commission. Brenda Iman, a paralegal with the Real Estate Commission, testified as a witness. The proceedings were electronically recorded.

SUMMARY OF THE EVIDENCE

On behalf of the Commission, three exhibits were entered into the record.

PRELIMINARY MATTERS

Upon receipt of Ms. Deitz's Exceptions, the Real Estate Commission scheduled a hearing on the Exceptions. Ms. Deitz was advised by letter, dated December 22, 2008, that "The Maryland Real Estate Commission has scheduled a hearing to allow argument on the exceptions for **Wednesday, March 18, 2009, at 2:00 p.m. The hearing will take place at 500 N. Calvert Street, Third Floor Conference Room, Baltimore, Maryland 21202.**" This notification of the hearing date, time and place was sent to Ms. Deitz by both certified mail, return receipt requested, and regular mail. A "Track and Confirm" search report from the United States Postal Service, which was entered into the record as part of Commission Exhibit 3, discloses that the letter providing notification of the hearing date, time and place was delivered to Ms. Deitz on December 23, 2008.

Ms. Deitz did not appear for the hearing. Ms. Iman contacted Ms. Deitz by telephone at approximately 2:00 p.m. to determine if Ms. Deitz intended to appear for the hearing. Ms. Iman stated that Ms. Deitz informed her that she was not appearing for the hearing due to telephone conversations she had with the Office of Administrative

Hearings (which indicated that her case had been closed), Commission personnel, and counsel for the Commission. Subsequent to the Commission's hearing on March 18, 2009, Ms. Deitz informed Ms. Iman that "Sondra Sykes" and "Herna" at the Office of Administrative Hearing had advised her that her case was closed. She stated that she also contacted Lucinda Sands, of the Commission's staff, who referred her to Jessica Kaufman, counsel to the Real Estate Commission. Ms. Deitz advised Ms. Iman that Ms. Kaufman had informed her that she had a right to retain an attorney to represent her at the hearing. Ms. Deitz contended that Ms. Kaufman was not attentive to the questions she was asking regarding her hearing and she felt she had no other option because her case was closed.

Ms. Kaufman stated that she spoke with Ms. Deitz approximately one week before the hearing and confirmed the hearing date; informed Ms. Deitz that she would be representing the Commission; and advised her that she was unable to provide her with legal advice since she represented the Commission. She argued that the Proposed Order should be sustained since Ms. Deitz had failed to meet her burden to go forward with her arguments in support of the Exceptions she filed.

FINDINGS OF FACT

The Commission adopts the Findings of Fact recommended by the ALJ.

CONCLUSIONS OF LAW

The Commission adopts the ALJ's Conclusions of Law.

DISCUSSION

Kay Deitz was properly served with notice of the hearing on her Exceptions as required by Code of Maryland Regulations ("COMAR") 09.01.02.07: The notice of the

hearing date, time and place was mailed to her by regular mail as well as by certified mail. Documentation from the United States Postal Service indicates that she received the notice on December 23, 2009.

Despite service of the notice, Ms. Deitz failed to appear for her hearing. The Commission finds that Ms. Deitz, in her telephone conversations with Commission personnel subsequent to the hearing, did not offer a valid reason for her non-appearance: The Office of Administrative Hearings case was, in fact, closed (but, as she was notified, the argument hearing on her Exceptions was scheduled for March 18, 2009 before the Commission) and Ms. Kaufman, as counsel to the Commission, was precluded from offering her legal advice regarding her case.

In accordance with COMAR 09.01.02.09, the Exceptions hearing could proceed as scheduled since Ms. Deitz had been served in accordance with COMAR 09.01.02.07, had failed to appear for the hearing and had failed to obtain a postponement of the hearing from the Commission.¹

As a result of her non-appearance, Ms. Deitz waived her right to offer any arguments or evidence in support of the contention, made in her Exceptions, that she should not be suspended.

Ms. Deitz, a licensed real estate agent, was the agent for the sellers of property located at 1032 Arncliffe Road in Baltimore County, Maryland. On or about September 29, 2006, the Claimant executed a contract to purchase the property. The contract was conditioned on the completion of a home inspection. The home inspector recommended

¹COMAR 09.11.03.01F. provides that the panel may dismiss an appeal without holding a hearing if the person who filed exceptions to the proposed order fails to appear at the scheduled time after receiving proper notice. If the appeal had been dismissed, the resulting decision would have been the same as set forth in this Order.

a number of repairs and corrections to the property, including a recommendation to remedy a problem with the furnace which was causing heat to be distributed unevenly throughout the house. The inspector also recommended that the furnace be examined and repaired or replaced by a licensed heating, ventilation and air conditioning technician.

On or about October 16, 2006, the parties signed an addendum to the contract by which the sellers agreed to repair problems found during the home inspection, including repairing or replacing the furnace. On December 13, 2006, the Claimant and her realtor made a walk-through of the property and found that the furnace was still not in good working order. A Walk-through Agreement was prepared as a result.

The Respondent, Kay Deitz, signed the Walk-through Agreement at closing on December 15, 2006 indicating that the seller agreed to correct the noted discrepancies. Ms. Deitz indicated to the Commission's investigator that she signed the Walk-through Agreement even though the sellers had told her they had replaced a part on the furnace and that they would cancel the contract before they would pay for further repairs to the furnace system. Despite having this information regarding the sellers' position on the furnace issue, Ms. Deitz signed the Walk-through Agreement as agent for the seller, and represented to the Claimant that she would ensure that necessary repairs would be made or the furnace replaced, if the sellers failed to repair or replace the furnace. Based on that representation, the Claimant went through with settlement and took possession of the property.

Ms. Deitz sent a heating, ventilation and air conditioning technician to inspect the furnace subsequent to settlement. The technician estimated that to correct the problems with the furnace and attached duct work would cost approximately \$2,600 to \$5,300.

To date, no repairs have been made to the furnace system nor has it been replaced. Ms. Deitz has made no further attempts to have the furnace system repaired or replaced.

Based on the evidence actually in the record, there is no question that the factual findings made by the ALJ are supported nor that the conclusions of law are reasonable. The Respondent, Kay Deitz, represented to the Claimant that the sellers would fix the furnace or if they chose not to do so, then the Respondent would fix the furnace. Despite these representations, the furnace system has not been repaired or replaced. This behavior on the part of the Respondent evidences bad faith and untrustworthiness as well as dishonesty and fraud and violates §17-322(b)(25), Business Occupations and Professions Article, *Annotated Code of Maryland* (Supp. 2008). This conduct also violated COMAR 09.11.02.01 which provides that the Respondent had a duty to protect the public against fraud, misrepresentation or unethical practices in the real estate industry.

The Commission also concludes that the penalties imposed are reasonable based on an evaluation of the factors set forth in Section 17-322(c)(2), Business Occupations and Professions Articles, *Annotated Code of Maryland*.

Section 17-322(c)(2) of the Business Occupations Article lists the factors that must be considered before imposing a civil penalty:

(2) To determine the amount of the penalty imposed, the Commission shall consider:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee.

The Commission finds the Respondent's violations to be serious. In order to insure that the sale went through at settlement, the Respondent lied about her clients' willingness to fix the furnace system and also lied about her own willingness to guarantee that the system would be fixed, even if the repairs or replacement were at her own expense. These actions demonstrate bad faith and undermine the integrity and dignity of the real estate profession.

The Claimant was harmed by Ms. Deitz's actions because she did not receive the benefit of a repaired or replaced furnace system despite the fact that she was guaranteed that benefit by the Walk-through Agreement and the verbal assurances of Ms. Deitz at settlement. The harm was deliberately caused by the Respondent in order to close the sale of the property.

The Respondent evidenced bad faith when she signed the Walk-through Agreement on behalf of the sellers, knowing that they would not pay for additional repairs to the furnace system, and when she refused to fix the furnace system despite her assurances, at settlement, that she would do so in the event the sellers refused to make the necessary repairs or replacement.

The Respondent has no other disciplinary history.

Based on an evaluation of these factors, the Commission concludes that the penalties of a fine of \$1,500 for each violation, totaling \$3,000 and a suspension of the Respondent's real estate license for a period of thirty days are reasonable.

ORDER

It is this 1st day of April 2009, by the Maryland Real Estate Commission **ORDERED**,

1. That the Respondent, Kay Deitz, has violated §17-322(b)(25) of the Business Occupations and Professions Article, *Annotated Code of Maryland*, and COMAR 09.11.02.02A;

2. That the Respondent, Kay Deitz, be assessed a civil penalty of \$1,500.00 for each violation, for a total of \$3,000.00 in civil penalties which shall be paid within thirty days of the date of this Order;

3. That all real estate licenses held by the Respondent, Kay V. Deitz, be **SUSPENDED** for thirty days;

4. That the Claimant, Shenesse Gomes, be reimbursed \$5,300.00 from the Maryland Real Estate Guaranty Fund as a result of the actual loss that she sustained because of the conduct of the Respondent;

5. That all real estate licenses held by the Respondent, Kay Deitz, be and are hereby **SUSPENDED** until the Maryland Real Estate Guaranty Fund is reimbursed by the Respondent and that this suspension is in addition to and not in lieu of the thirty days suspension set forth above; and

6. That the records and publications of the Maryland Real Estate Commission reflect this decision.

MARYLAND REAL ESTATE COMMISSION

By: Katherine J. Connelly, Sec. Dei
for Nancy K. Simpson, Commissioner

NOTE: A judicial review of this Final Order may be sought in the Circuit Court of Maryland in which the Appellant resides or has his/her principal place of business, or in the Circuit Court for Baltimore City. A petition for judicial review must be filed with the court within 30 days after the mailing of this Order.

THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE
COMMISSION

V.

KAY V. DEITZ
RESPONDENT

AND

CLAIM OF SHENESSE GOMES
AGAINST THE MARYLAND
REAL ESTATE COMMISSION
GUARANTY FUND

* BEFORE MARC NACHMAN,
* ADMINISTRATIVE LAW JUDGE,
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH No: DLR-REC-24-07-47699
* REC CASE NO: 2007-RE-485

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PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated September 29, 2008, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 20th day of November, 2008,

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

11/20/08
Date

By: Katherine F. Connelly, Esq. Dir.
Anne S. Cooke, Commissioner

MARYLAND REAL ESTATE

COMMISSION

v.

KAY V. DEITZ, RESPONDENT

and the

CLAIM OF SHENESSE GOMES AGAINST

THE MARYLAND REAL ESTATE

COMMISSION GUARANTY FUND

* BEFORE MARC H. NACHMAN,
* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS

* OAH CASE NO: DLR-REC-24-07-47699

* COMPLAINT NO.: 07-RE-845 485 *CS*

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On February 8, 2007, Shenesse Gomes (Claimant) filed a complaint (the Complaint) with the Maryland Real Estate Commission (REC). The Claimant also filed a claim for reimbursement (the Claim) against the REC's Guaranty Fund (the Fund) for losses allegedly caused by the acts and omissions of a licensed real estate agent, Kay V. Deitz (Respondent).

Based on the Complaint, the REC determined that charges against the Respondent were warranted and, on December 11, 2007, the REC filed a Statement of Charges and Order for Hearing (the Charges). The Charges also indicated that the REC determined that the Claimant

was entitled to a hearing on the Claim against the Fund as these matters arose out of the same facts and circumstances and, therefore, should be heard and determined at the same time. These matters were transmitted to the Office of Administrative Hearings (OAH) on December 13, 2007.

On March 24, 2008, the OAH sent notice of the hearing by certified mail to the Respondent at Yerman, Witman, Gaines, and Garceau,¹ the Respondent's business address on file with the REC. The notice advised the Respondent of the time, place, and date of the hearing. The U.S. Postal Service returned the certified mail return receipt card signed by the Respondent.

On July 30, 2008, I held a hearing at the OAH in Hunt Valley, Maryland on the Charges against the Respondent and the Claim against the Fund. Assistant Attorney General (AAG) Jessica Kaufman appeared on behalf of the REC; the Fund was represented by AAG Hope Sachs. The Claimant was present and represented herself. The Respondent was not present nor was there any person or persons claiming to be her agent or representative.

Because the OAH sent notice to the Respondent at her last known address of record, and the Respondent signed her name on the return receipt card verifying receipt, I directed that the case proceed in the Respondent's absence under § 17-324(f) of the Business Occupations and Professions Article, Annotated Code of Maryland (2004) (Bus. Occ. & Prof), section 10-209 of the State Government Article, Annotated Code of Maryland (2004 and Supp. 2007), and Code of Maryland Regulations (COMAR) 09.01.02.07D and 09.01.02.09.

I heard this case pursuant to Bus. Occ. & Prof.. § 17-324. Procedure is governed by the Administrative Procedure Act, Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2004 &

¹ 303 S. Main Street, Bel Air, Maryland 21024.

Supp. 2007), OAH's Rules of Procedure, COMAR 28.02.01, and the REC's Hearing Regulations, COMAR 09.11.03.02 and 09.01.03.

ISSUES

1. Did the Respondent violate § 17-322(b)(25) of the Business Occupations Article by engaging in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent or improper dealings?
2. Did the Respondent violate COMAR 09.11.02.02A by ignoring her statutory obligations towards the non-client parties to the transaction?
3. Did the Claimant suffer an actual monetary loss as a result of the conduct of the Respondent and, if so, what is the amount of the loss?

SUMMARY OF THE EVIDENCE

Exhibits

The REC submitted the following documents, which I admitted into evidence:

REC #1: Notice of Hearing sent to Respondent with attached green card indicating that she received the notice

REC #2: Document transmitting the case, including the Charges, to OAH.

REC #3: The Respondent's licensing record with the REC (License # 0376968).

REC #4: Investigative Services Report of Investigation prepared by REC Investigator Robert Oliver with the following attachments:

1. Complaint and Claim filed by Claimant, dated February 8, 2007;
2. Letter from Kay Deitz Real Estate, Inc., to REC, dated March 15, 2007;
3. Agent Synopsis of 1032 Arncliffe Road (the Property), dated January 3, 2007;
4. Maryland Department of Assessments and Taxation record for the Property, dated August 3, 2007;
5. Coldwell Banker Maryland Residential Contract of Sale (the Contract) for the Property signed by Claimant as the buyer, ratified by the sellers September 30, 2006;

6. Addendum to the Contract conditioning contract upon a home inspection, printed September 29, 2006;
7. Seller's Disclosure statement for the Property, dated September 22, 2006;
8. US Inspect Home Inspection Report for the Property dated October 9, 2006;
9. Amendment/Addendum to the Contract requesting repairs as a result of the home inspection, dated October 16, 2006;
10. Walk-through Agreement requesting repairs, including repairs to the furnace, dated December 13, 2006;
11. Settlement Sheet for the Property;
12. E-mail message from Respondent to Alma Illian, dated December 28, 2006;
13. Letter from Claimant to sellers of the Property dated January 3, 2007; and
14. Letter from Respondent to sellers of the Property dated February 9, 2007.

Neither the Claimant, the Respondent, nor the Fund offered any additional exhibits to be admitted into evidence.

Testimony

The REC called the following witnesses:

1. The Claimant;
2. The Claimant's realtor, Alma Illian; and
3. Robert Oliver, Investigator for the REC

The Claimant also testified in support of her claim against the Fund.

No witnesses were presented on behalf of the Respondent or the Fund.

FINDINGS OF FACT

Having considered the testimony and exhibits presented, I find the following facts by a preponderance of the evidence:

1. The Respondent has been a licensed real estate agent in Maryland since January 14, 1985, under license number 0376968. Respondent's current licensing period ends on October 17, 2009.
2. The Respondent is currently affiliated with Garceau Realty in Bel Air, Maryland. At the time of the sale of the Property, she was operating as Kay Deitz Real Estate, Inc., also located in Bel Air, Maryland.
3. At all times relevant to this matter, the Respondent was an agent for the sellers.
4. The Property is located at 1032 Arncliffe Road in Baltimore County, Maryland.
5. On or about September 29, 2006, the Claimant signed the Contract to buy the Property for \$179,900.00. The Contract was conditioned on the completion of a home inspection.
6. The Contract was ratified on September 30, 2006. Settlement was scheduled to take place on December 14, 2006.
7. A home inspection was conducted on October 9, 2006. The home inspector recommended a number of repairs and corrections to the property, including a recommendation to remedy a problem with the furnace which was causing heat to be unevenly distributed throughout the house. The inspector also recommended that the furnace be examined and repaired or replaced by a licensed Heating, Ventilating, and Air Conditioning (HVAC) technician.
8. On or about October 16, 2006, the parties signed an addendum to the Contract by which the sellers agreed to repair problems found during the home inspection, including

repairing or replacing the furnace system. The addendum also included a provision assuring that the Claimant would be present when the licensed HVAC technician serviced the furnace.

9. The Claimant was never notified of any repairs to be made to the furnace and was not present when any furnace inspections or repairs were performed.
10. On December 13, 2006, the Claimant and her realtor, Alma Illian, made a walk-through of the property and found that the HVAC unit was still not in good working order. A Walk-through Agreement was prepared.
11. At closing on December 15, 2006, the Respondent signed the Walk-through Agreement indicating that the seller agreed to correct the noted discrepancies. Respondent signed the Walk-through Agreement as agent for the seller, representing to the Claimant that, if the sellers failed to repair the furnace, the Respondent would ensure that necessary repairs would be made of the furnace would be replaced.
12. Because the Respondent promised that the furnace would be repaired or replaced, the Claimant went through with settlement and took possession of the property.
13. The Respondent sent an inspector from Blue Dot of Maryland to the property to inspect the furnace. The technician noted problems with both the furnace and the attached duct work and prepared an estimate of \$2,600-\$5,300 to repair or replace the system.
14. To date, no repairs have been made to the furnace system to restore the system to good working order, nor has the system been replaced.
15. Respondent has not, to date, made any further attempts to have the furnace repaired or replaced.

DISCUSSION

I. Notice requirements.

A threshold question in this case is whether the Respondent received timely notice of the hearing; if the Respondent were properly notified of the hearing, the case could proceed in her absence. Pursuant to Bus. Occ. & Prof., § 17-324(d)(1), at least ten days before the hearing, notice must be given to a respondent by certified mail to his or her last known business address. If, after due notice, a respondent fails or refuses to appear, the case may go forward. Bus. Occ. & Prof., § 17-324(f).

A Notice of Hearing was mailed to the Respondent by certified and regular mail on March 24, 2008, to the address that the REC had on record for the Respondent (Fund. Ex. # 1 and 2). On March 26, 2008, the Respondent signed the certified mail receipt “green card” indicating that she received the Notice of Hearing. The Claimant also stated that, shortly before the hearing, she discussed this matter with the Respondent, who said that she would “see [her] in court.” I am satisfied that the OAH Notice of Hearing sent to the Respondent was reasonably calculated to give the Respondent adequate notice to appear at the hearing, and indeed did so.

By letter received at the OAH on August 1, 2008, the Respondent acknowledged that she was scheduled to appear at the hearing on July 30, 2008, at 10:00 a.m., but she claims to have entered the hearing on her calendar “on the wrong date.” She acknowledge speaking with the Claimant in the week prior to the hearing, quoting the *Claimant* as saying that she would “see [the Respondent] in court.” The Respondent characterized her failing to appear as an “honest mistake” and requested that I consider granting her another hearing date. Although the

Respondent stated that the hearing, the complaint and the fund claim were important to her, she was not present.

There are several reasons why I will not favorably consider this request. The Notice of Hearing was sent to the Respondent as well as to all other parties, and the hearing date, time and location were all prominently written on the notice. It may have been an “honest” mistake for the Respondent not to be present, but the other parties were present and well-prepared to go forward. The hearing required the preparation by, as well as participation of, two Assistant Attorneys General (one each for the REC and the Fund), and the Claimant took time from work to be present. The REC investigator was here, as was Ms. Illian, both of whom were subpoenaed and, therefore, required to be present. The hearing took more than an hour to conclude, which does not account for the time spent at the beginning of the hearing waiting for the Respondent to appear. On balance, it would not be equitable that the parties and witnesses who were present at the hearing be required to prepare for and attend a second hearing.

Moreover, the Respondent’s letter does not meet the service and proof of service requirements in COMAR 28.02.01.24A, which requires that a copy of “any pleading, motion, response, correspondence, or other paper filed in any proceeding” be served promptly “on *all* other parties to the proceeding.” Proof of service must accompany any such submission and must include the date and manner of service, as well as the name and the address of the person served. COMAR 28.02.01.24C. Even if I were to ignore the lack of a proper certificate of service, the “cc:” at the end of the Respondent’s July 31 letter did not list either Assistant Attorney General as a recipient of that request. If a party fails to give proper notice to other parties, his or her request cannot be considered, as his or her opponent would not have been put on notice of the

request. The Appellant's request for a new hearing was therefore not properly served on all parties to the proceeding and will not be considered.

Accordingly, the Respondent failed to appear and the case properly proceeded in her absence, adequate notice having been given. Furthermore, the Respondent's request for the scheduling of a second hearing is denied. Bus. Occ. & Prof., § 17-324(d)(1) and (h).

II. Regulatory Charges

The charges against the Respondent arose out of a contract for sale dated on or about September 29, 2006, and the subsequent addenda to that contract dated December 13, 2006, detailing repairs to be made to the Property. The REC alleges that the Respondent engaged in conduct demonstrating dishonest dealings and that the Respondent breached a duty owed to the Claimant as a party to a transaction in which the Respondent was acting as an agent to the sellers. (REC Exhibit #2.) It is alleged that the Respondent made misrepresentations to the Claimant in order to secure the sale of the Property by assuring the Claimant at closing that the furnace issues would be remedied by the sellers and, if not by the sellers, then by the Respondent herself, even though the sellers never had any intention to have the furnace repaired or replaced by a licensed HVAC technician as promised.²

The Claimant made an offer to buy the property and signed a contract to do so on or about September 29, 2006; the offer was accepted by the sellers and the contract was ratified on September 30, 2006. (REC Exhibit 4, Attachment 5.) The contract was subject to the satisfactory completion of a home inspection. (REC Exhibit 4, Attachment 6.) The home

² It is unclear whether the sellers knew about or agreed to fulfill the contractual duties to which the Respondent obligated them by preparing the addendum at settlement. If the sellers did not know about the addendum, the Respondent committed a fraud against *all* of the parties to the transaction. If the sellers knew about but expressed their intention not to be bound to repairs or replacement of the furnace under the addendum, the Respondent should not have signed for them. If the sellers knew about but later chose to disavow their obligation under the addendum, the Respondent would be obligated to pay for the repair or replacement under the specific terms of the addendum. In any such instance, the Respondent was responsible for the loss to the Claimant.

inspection was conducted on October 9, 2006 and revealed a number of conditions in and around the Property requiring repair, including repairs needed to the furnace (REC Exhibit 4, Attachment 8.) The home inspector recommended to the Claimant that the furnace be repaired or replaced by a licensed HVAC technician (Test. Claimant.)

On or about October 16, 2006, the Claimant proposed an addendum to the Contract through her agent, Alma Illian. This addendum listed the repairs to the Property that the Claimant was requesting as a result of the home inspection. This addendum also contained a specific request that the Claimant be present when the certified HVAC technician inspected and repaired the furnace unit. The sellers signed this addendum, agreeing to make the requested repairs (REC Exhibit 4, Attachment 9).

On December 13, 2006, the Claimant and her agent did a walk-through of the Property to prepare for closing. Neither the sellers nor the Respondent were present during the walk-through. The Claimant learned during the walk-through that the furnace still was not operational. A Walk-through Agreement was prepared and presented to the Respondent as agent for the sellers at closing on December 15, 2006.

The sellers were not present at closing. The Respondent telephoned the sellers during closing and was informed that the sellers already had a part on the furnace replaced and that they were not willing to make any further repairs. Despite that fact, Respondent signed the Walk-through-Agreement at closing certifying that the sellers would correct the deficiencies listed in the Agreement, including the problems with the furnace (REC Exhibit 4, Attachment 10). Respondent orally guaranteed to the Claimant that she (the Respondent) would herself take care of the furnace problems if the sellers failed to do so (Test. Claimant, test. Ms. Illian). The

Claimant only agreed to close on the house because of the Respondent's assurances (Test. Claimant).

The Respondent sent a technician from Blue Dot of Maryland to the property to inspect the HVAC system; he reported that extensive work would need to be done to remedy the heating situation (REC Exhibit 4). The results of the inspection were sent by e-mail to the Claimant's agent, Ms. Illian, who then passed this information on to the Claimant (REC Exhibit 4, Attachment 12). The Claimant sent a letter to the sellers on January 3, 2007 requesting that the sellers make repairs to the furnace as they had agreed to do (REC Exhibit 4, Attachment 13). On February 9, 2007, the Respondent sent a letter to the sellers requesting that they repair the furnace (REC Exhibit 4, Attachment 14). The Respondent has made no further moves to repair or replace the furnace, nor have the sellers.

The REC charged the Respondent with violations of the statutory and regulatory sections governing licensed real estate brokers and agents. The sections of the law that the Respondent allegedly violated are set forth below:

§ 17-322 Denials, reprimands, suspensions, revocations, and penalties – Grounds

...
(b) Grounds. – Subject to the hearing provisions of § 17-324 of this subtitle, the [REC] may deny a license to any applicant, reprimand any licensee, or suspend or revoke a license if the applicant or licensee:

...
(25) engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings....

(c) Penalty. – (1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the [REC] may impose a penalty not exceeding \$5,000 for each violation.

Bus. Occ.& Prof., § 17-322(b)(25) and (c)(1). The Code of Ethics for Real Estate agents is found at COMAR 09.11.02. COMAR 09.11.02.01 provides, in pertinent part:

A. 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.

The REC, as the moving party on the charges must prove, by a preponderance of the evidence, that the Respondent violated the statutory and regulatory sections at issue. *See, e.g.,* Md. Code Ann., State Gov't Art., § 10-217 (2004); *Commissioner of Labor and Industry v. Bethlehem Steel Corp.*, 344 Md. 17 (1996). For the reasons discussed below, I find that the Respondent violated all of the statutory and regulatory provisions with which she was charged.

The evidence regarding the regulatory violations was unrefuted by any direct evidence at the hearing. The Respondent did not appear and no testimony or evidence was offered in her behalf. The only evidence exculpating the Respondent from responsibility comes from her statements to REC Inspector Robert Oliver which were contained in his investigative report and addressed in his testimony.

Mr. Oliver testified that the Respondent told him that she did not know that the requested repairs to the HVAC unit had not been completed until the closing on December 15, 2006. (Test. Oliver, REC Exhibit 4.) Respondent also indicated that the sellers became aggravated with the Claimant's requests for repairs and that the HVAC repairs just "slipped through." (*Id.*) Respondent admitted in her interview with Mr. Oliver that she told the Claimant that she would get someone to look at the furnace for them and that she never doubted the sellers would cooperate on the issue of the furnace. (REC Exhibit #4.) She also indicated to Mr. Oliver that she signed the Walk-through Agreement even though the sellers told her that they would cancel the contract before they would repair the system. (*Id.*) This sentiment is also echoed the Respondent's letter to the sellers in which she discusses her desire not to lose the Contract on the Property and that she wanted to "make this go away—for you!" (REC Exhibit 4, Attachment

14). The Respondent's exculpatory statements do not rebut the overwhelming amount and quality of live testimony and documentary evidence presented that demonstrates that Respondent violated the applicable statutes and regulations.

The testimony of the Claimant and Alma Illian was very consistent and credible. Both testified that the Respondent not only promised to have an HVAC technician inspect the furnace, but she also promised that, if the sellers did not take responsibility to inspect the furnace, she would do so. I find no reason to believe the statements of the absentee Respondent that she only intended to have the unit inspected over the credible live testimony of the Complainant and Ms. Illian. Furthermore, in her letter to the sellers, the Respondent acknowledges that she knew she might have been responsible for some repairs—just not repairs as extensive as would actually be required to put the furnace in good working order (REC Exhibit 4, Attachment 14). In her letters, the Respondent attempts to absolve herself of any responsibility for the furnace, but she clearly made the furnace her responsibility when she promised the Claimant at closing that she (the Respondent) would personally take care of the furnace.

For reasons explained above, the Respondent misrepresented to the Claimant and her agent that the sellers would fix the furnace or that if they chose not to do so, then the Respondent would fix the furnace; such behavior evidences bad faith and untrustworthiness as well as dishonesty and fraud. Accordingly, the Respondent also violated Bus. Occ. & Prof. § 17-322(b)(25). Furthermore, this same conduct also violated COMAR 09.11.02.01 by violating her duty to protect the public against fraud, misrepresentation or unethical practices in the real estate industry.

Penalties

Section 17-322(c)(1) of the Business Occupations Article provides that a licensee may be reprimanded or have his/her Real Estate license suspended or revoked for violating the Maryland Real Estate law. The section also provides that instead of *or in addition to* reprimanding a licensee or suspending or revoking a Real Estate license, the REC may impose a civil penalty not to exceed \$5,000.00 for each violation.³ Section 17-322(c)(2) of the Business Occupations Article lists the factors that must be considered before imposing a civil penalty:

(2) To determine the amount of the penalty imposed, the [REC] shall consider:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee.

Md. Code Ann., Bus. & Prof. § 17-322(c)(2) (Supp. 2007). The Respondent's violations are serious. In order to insure that the sale went through, the Respondent lied about her clients' willingness to fix the furnace and also lied about her own willingness to ensure that it would be fixed, even at her own expense. Her actions demonstrate bad faith and undermine the integrity and dignity of the real estate profession.

The Claimant was harmed by the Respondent's actions because she did not receive the benefit of the repair or replacement of her HVAC unit even though it had been guaranteed in writing on numerous occasions and was verbally guaranteed at closing by the Respondent herself. The Respondent's actions were deliberate and calculated in order to close the sale.

The Respondent showed bad faith by refusing to accept responsibility for her conduct

³ Emphasis added.

saying that she *assumed* the sellers would fix the unit despite their repeated refusals to do so. Respondent even told the sellers in her letter that she could not be held responsible for the furnace because it was not “[her] role to do more” (REC Exhibit 4, Attachment 14).

The Respondent has no other disciplinary history.

The REC recommended that the Respondent have her license suspended for thirty days and that she pay a fine of \$1,500.00 for each violation, totaling \$3,000.00. Based on the seriousness of the violations and the Respondent’s continued lack of good faith, I agree with the REC’s recommendations. Consequently, I recommend a total of \$3,000.00 in civil penalties for the two violations in addition to the suspension of the Respondent’s real estate license for thirty days.

Guaranty Fund Claim

The Claimant has the burden of proving that she is entitled to reimbursement from the Fund. The Claimant claims to have a loss of \$5,300.00—the cost to get her furnace replaced or repaired—relating the loss to the acts or omissions of the Respondent. The question now is to determine whether her claim against the Fund should be accepted.

Section 17-404 of the Business Occupations Article sets forth the criteria for recovery against the Fund:

§ 17-404. Claims against the 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.

Bus. Occ. & Prof. § 17-404 (2004). COMAR 09.11.03.04 regulates claims against the Guaranty

Fund and provides, in pertinent part:

.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 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.

In this case, there is no dispute that the claim is the result of “an act or omission that occurs in the provision of real estate brokerage services by a licensed associate real estate broker” which “involve a transaction that relates to real estate that is located in the State.” There is also no dispute as to the characterization of the act or omission as fraudulent or a misrepresentation sanctioned by Bus. Occ. & Prof. § 17-404(a)(2)(iii). The Fund did not present any evidence or testimony to rebut the Claimant’s statement that she had an actual loss of

\$5,300.00⁴ or that that loss was due to misconduct on the part of the Respondent. In fact, in her closing statement, AAG Sachs (representing the Fund) stated that \$5,300.00 was a fair award to the Claimant and that the acts and omissions of the Respondent were certainly covered under the applicable statutes and regulations. It is uncontroverted that the Claimant has suffered an actual loss as defined under the Fund's statute and regulations. I recommend that the Claimant be awarded \$5,300.00 from the Fund to cover the cost of the repair or replacement of her furnace system.

CONCLUSIONS OF LAW

Upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that:

The Respondent violated § 17-322(b)(25) of the Business Occupations Article by engaging in conduct that demonstrates bad faith and untrustworthiness, and that constitutes dishonest, fraudulent and improper dealings;

The Respondent violated COMAR 09.11.02.02A by ignoring her statutory obligations towards the non-client parties to the transaction;

The Claimant suffered an actual loss of \$5,300.00 as a result of the Respondent's fraud, misrepresentation and deceit under § 17-404 of the Business Occupations Article; COMAR 09.11.03.04.

RECOMMENDED ORDER

I RECOMMEND that the Maryland Real Estate Commission:

ORDER that the Respondent's license be suspended for thirty days and that the Respondent be assessed a civil penalty of \$1,500.00 for each violation, for a total of \$3,000.00 in civil penalties;

⁴ This statement was based on the estimate from the Blue Dot of Maryland technician's report to the Respondent as conveyed via e-mail to the Claimant through her agent, Ms. Illian.

ORDER that the Claimant be reimbursed \$5,300.00 from the Maryland Real Estate Guaranty Fund to compensate her for the actual loss that she sustained because of the conduct of the Respondent; and

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

September 29, 2008
Date Decision Mailed

MN

Doc #98859



Marc Nachman
Administrative Law Judge