

**IN THE MATTER OF THE CLAIM OF
DIANE SIMPSON,
CLAIMANT,**

V.

**THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND FOR
THE ALLEGED MISCONDUCT OF
SUE A. WILLISON, LICENSED REAL
ESTATE SALESPERSON,
RESPONDENT**

*** BEFORE MARINA L. SABETT,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH CASE No.: DLR-REC-22-12-12310
* MREC COMPLAINT No. : 11-RE-500GF
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RECOMMENDED DECISION

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STATEMENT OF THE CASE

On June 24, 2011, Diane Simpson (Claimant) filed a complaint with the Maryland Real Estate Commission (MREC) and a claim against the Maryland Real Estate Commission Guaranty Fund (Fund). The claim was for monetary losses allegedly incurred by the Claimant as a result of the misconduct of Sue A. Willison, Licensed Real Estate Salesperson (Respondent). On March 9, 2012, the MREC transmitted the matter to the Office of Administrative Hearings (OAH) for a hearing regarding the Claimant's claim against the Fund.

I held a hearing on July 5, 2012, at the OAH in Wheaton, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2010). The Claimant represented herself but appeared telephonically, without objection, from her location in Gaborone, Botswana (Africa). Although an April 11, 2012 notice of this hearing was issued by OAH by regular mail and by certified mail received and signed for at the Respondent's address of record on April 18, 2012, the Respondent did not appear. By Consent Order dated November 22, 2011, the Respondent may not contest the claim filed by the Claimant.¹ Kris King, Assistant Attorney General, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); Code of Maryland Regulations (COMAR) 09.01.03 and 28.02.01.

ISSUES

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

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

SUMMARY OF THE EVIDENCE

Exhibits

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

Fund Ex. 1 A Notice of Hearing, dated April 11, 2011, with attached Certified Mail Receipts confirming delivery of the Notice on the Respondent and the Claimant

¹ A more detailed discussion of the contents of the Consent Order and the circumstances leading to its entry are discussed *infra* in the Findings of Fact and Discussion.

Fund Ex. 2 Order for Hearing, dated March 7, 2012

Fund Ex. 3 DLLR license registration information for the Respondent, dated July 3, 2012
(A and B)

Fund Ex. 4 Affidavit of Steven Long, Assistant Executive Director of the MREC, dated
March 12, 2012

Fund Ex. 5 MREC Report of Investigation, dated January 16, 2012, with attachments

No exhibits were admitted on behalf of the Claimant and no exhibits were admitted on behalf of the Respondent.

Testimony

The Claimant testified on her own behalf. No testimony was offered on behalf of the Respondent. The Fund presented the testimony of Jack L. Mull, Jr., an investigator of behalf of the MREC.

FINDINGS OF FACT

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

1. At all times relevant to this matter, the Respondent was a Licensed Real Estate Salesperson, registration number 05 527749, and worked on behalf of West Patrick Property Solutions, LLC (West Patrick), a property management company located in Frederick, Maryland.
2. On or around November 2, 2010, the Claimant, as the owner of a property located at 800 N. Market Street, Frederick, Maryland 21701 (Market Street property), entered into a Property Management and Exclusive Rental Agreement (Agreement) with the Respondent in her role as the agent of West Patrick. The Agreement directed the Respondent to rent, lease, operate and manage the Claimant's Market Street property.

3. The Respondent's leasing fee under the Agreement was 100% for a one-year leasing period and "TBD" for a two-year leasing period. The Respondent's management fee under the Agreement was the greater of \$80.00 or 8% of the total gross rents collected for each month.
4. Pursuant to that Agreement, on or around January 20, 2011, the Respondent entered into a Residential Dwelling Lease for Maryland (Lease) with Margaret Evans for occupancy as a tenant of the Market Street property beginning March 1, 2011.
5. The Lease required Ms. Evans to provide the Respondent with a security deposit in the amount of \$1,750.00 and monthly rent in the amount of \$1,750.00.
6. The tenant paid the security deposit and the monthly rent for March through May 2011 to the Respondent.
7. Neither the Claimant nor anyone on her behalf ever received any money for that period.
8. The Claimant terminated her Agreement with the Respondent on or around May 20, 2011.
9. The Claimant acknowledged that the Respondent was entitled to 100% of the March rent (first month's rent) as a leasing fee.
10. Under the Agreement, the Respondent was entitled to 8% of the total of gross rents collected in each month as a property management fee.
11. Accordingly, for the gross rent collected at a rate of \$1,750.00 per month for the months of April and May, the Respondent was entitled to 8% of \$3,500.00 as a property management fee, which equals \$280.00.
12. The Respondent improperly withheld \$3,220.00 from the Claimant, which reflects the \$3,500.00 in gross rents collected for the months of April and May 2011 for the Market Street property, minus the \$280.00, the total property management fee for April and May 2011.

13. The tenant of the Market Street property has made her own claim for the security deposit, as it was never transferred to the Claimant or anyone acting on the Claimant's behalf.
14. The Respondent was the only signatory on the bank accounts opened and maintained by West Patrick and she held 100% ownership of West Patrick.
15. On November 22, 2011, the Respondent entered into a Consent Order with MREC in which she admitted that she violated Section 17-322(b)(22) of the Business Occupations and Professions Article of the Maryland Annotated Code as to the Claimant (and many others like her) when she failed "to promptly account for or remit money that came into her possession, but belonged to another person." Consent Order at paragraph 5 and Appendix "A", Fund Ex. 5, at attachment 5.
16. Under the Consent Order, the Respondent further waived any right to participate in the hearing of this matter and waived her right to contest or appeal any decision by the Commission that involves a claim arising out of her "actions while a property manager at West Patrick Solutions." Id. at page 3.
17. Further, under the Consent Order the Respondent may not "apply to the Commission in the future for a license to engage in the provision of or assist in the provision of real estate brokerage services in the State." Id.

DISCUSSION

The burden of proof at a hearing on a claim against the Fund is on the "claimant to establish the validity of the claim." Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2010). Section 17-404(a) of the same statute governs all claims brought against the Fund and sets forth, in pertinent part, the following criteria that must be established by a claimant to obtain an award:

§ 17-404. Claims against Guaranty Fund.

(a) *In general.*-(1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.

(2) A claim shall:

(i) be based on an act or omission that occurs in the provision of real estate brokerage services by:

1. a licensed real estate broker;
2. a licensed associate real estate broker;
3. a licensed real estate salesperson; or
4. an unlicensed employee of a licensed real estate broker;

(ii) involve a transaction that relates to real estate that is located in the State; and

(iii) be based on an act or omission:

1. in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or
2. that constitutes fraud or misrepresentation.

(b) *Limitation on recovery.*- The amount recovered for any claim against the Guaranty Fund may not exceed \$50,000 for each claim.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a), (b) (Supp. 2012). *See* COMAR 09.11.03.04.

For the reasons that follow, the Claimant is entitled to an award of \$3,220.00 for the actual monetary losses she suffered as the result of the acts or omissions of the Respondent in the instant case. Md. Code Ann., Bus. Occ. & Prof. § 17-410(a), (b) (2010); COMAR 09.11.01.18

By Consent Order dated November 22, 2011, the Respondent admitted that she violated Section 17-322(b)(22) of the Business Occupations and Professions Article of the Maryland Annotated Code as to the Claimant (and many others like her) when she failed “to promptly account for or remit money that came into her possession, but belonged to another person.” Consent Order at paragraph 5 and Appendix “A”, Fund Ex. 5, at attachment 5. Under that Order, the Respondent further waived any right to participate in the hearing of this matter and waived her right to contest or appeal any decision by the Commission that involves a claim arising out of her “actions while a property manager at West Patrick Solutions.” *Id.* at page 3.

The Respondent, as an agent of West Patrick, entered into an Agreement with the Claimant in this case on or around November 2, 2010, to rent, lease, operate and manage the Claimant's Market Street property located in Frederick, Maryland. The Respondent's leasing fee under the Agreement was 100% of the first month's full rent. Agreement, Fund Ex. 5, at attachments 3. The Respondent's management fee under the Agreement was the greater of \$80.00 or 8% of the total gross rents collected for each month. Id.

Pursuant to the Agreement, on or around January 20, 2011, the Respondent entered into a Lease with Margaret Evans for a two-year occupancy term as a tenant of the Market Street property beginning March 1, 2011. Lease, Fund Ex. 5, at attachment 4. The Lease required Ms. Evans to provide the Respondent with a security deposit in the amount of \$1,750.00 and monthly rent in the amount of \$1,750.00. Id.

At the hearing, Mr. Jack Mull, Jr., an investigator on behalf of the MREC and a witness for the Fund, testified that he investigated the Claimant's claim against the Respondent. Specifically, he testified that the tenant had verified to him that she had paid her security deposit and rent for the months of March through May 2011 for the Market Street property directly to the Respondent. He testified that the tenant disclosed that her security deposit was never returned to her and that she had her own claim against the Respondent for the return of her deposit. Mr. Mull further testified that the Claimant had corresponded with him by e-mail that she had never received payment for the April and May 2011 rents and that he had memorialized such information in his December 5, 2011 report, admitted as Fund Ex. 5, with attachments.

Although the Claimant's memory was sketchy with regard to her correspondence with Mr. Mull, she did recall that she had terminated her Agreement with the Respondent on or around May 20, 2011, given the Respondent's failure to (1) transmit the net rent proceeds and (2)

properly manage the Claimant's Market Street property. The Claimant testified that because the Respondent failed to correct some code violations at the Market Street property for which the Claimant as the owner was ultimately responsible to pay, the Respondent was not entitled to her 8% management fee for April and May 2011. While the Claimant presented no documents in support of such expenses/fines, she is unable to recover such losses from the Fund in any event as she may not recover "monetary losses other than the monetary loss from the originating transaction. Actual monetary losses may not include commissions owed to a licensee of this Commission acting in his capacity as either a principal or an agent in a real estate transaction..." COMAR .09.11.01.18. Accordingly, not only is the evidence presented by the Claimant far too speculative to establish any monetary loss suffered by the Claimant as a result of the code violations, the Claimant's alleged loss is too far removed from the originating transaction to be compensable or to otherwise setoff the management fees due and owing to the Respondent under the Agreement.

Given the testimony of the Claimant and Mr. Mull, I find that the evidence sufficiently establishes that the tenant paid rent for the Market Street property in the amount of \$1,750.00 per month for the months of April and May 2011 directly to the Respondent.. I further find that the Respondent failed to transmit the net rent proceeds to the Claimant or anyone acting on her behalf. Although the Respondent was entitled to her management fee for April and May 2011 in the amount of \$280.00, I find that she wrongfully withheld from the Claimant the amount of \$3,220.00 in net rent proceeds for the Market Street property for the months of April and May 2011.

\$3500.00	Gross rent for April/May 2011
- \$ 280.00	<u>8% of gross rent for April/May 2011</u>
\$3220.00	Net rent proceeds

The Fund similarly suggested at the hearing that the Claimant is entitled to an award of \$3,220.00 from the Fund in this case.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Facts and Discussion, I conclude as a matter of law that the Claimant is entitled to reimbursement from the Real Estate Guaranty Fund in the amount of \$3,220.00 for actual losses resulting from the Respondent's actions. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(1), (2) and 17-410(b)(1) ; COMAR 09.11.01.18 and 09.11.03.04.

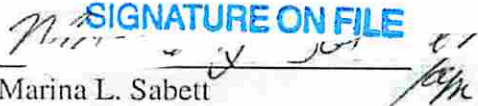
RECOMMENDED ORDER

I RECOMMEND that the MREC ORDER:

That the Claimant's claim against the Maryland Real Estate Guaranty Fund be ACCEPTED in the amount of \$3,220.00; and

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

September 26, 2012
Date Decision Mailed


SIGNATURE ON FILE
Marina L. Sabett
Administrative Law Judge

MLS/lh
137593

SIGNATUR

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