

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**MARYLAND REAL ESTATE
COMMISSION**

*

v.

* **OAH No. DLR-REC-24-09-21870**

**JORGE W. ESCALANTE
RESPONDENT**

*

* **REC CASE NO. 2007-RE-697**

AND

*

**CLAIM OF BETTY J. DILLARD
AGAINST THE REAL ESTATE
COMMISSION GUARANTY FUND
CLAIMANT**

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OPINION AND FINAL ORDER

This matter came before the Commission for argument on Exceptions filed by the Respondent, Jorge W. Escalante, to the Proposed Order of June 16, 2010. On May 25, 2010, Administration Law Judge M. Teresa Garland (“ALJ”) filed a Proposed Decision and Recommended Order in which she recommended that the Respondent’s real estate license be suspended for a sixty-day period and that he be assessed a civil penalty in the amount of \$10,000.00. The ALJ also recommended that the Claimant’s Real Estate Commission Guaranty Fund (“Fund”) claim against the Respondent be allowed in the amount of \$2,144.71.

On June 16, 2010, 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 which were dated July 12, 2010.

A hearing was held by a panel of the Commission, consisting of Commissioners J. Nicholas D’Amrosia, Nancy R. Simperts and Jeff M. Thaler, on October 20, 2010. Peter

Martin, Assistant Attorney General, represented the Commission. The Respondent, Jorge Escalante, appeared. Claimant, Betty J. Dillard, also appeared at the hearing. The proceedings were electronically recorded.

SUMMARY OF THE EVIDENCE

On behalf of the Commission, three exhibits, including the exhibits entered at the hearing before the ALJ, were entered into evidence. A transcript of the ALJ's hearing was not provided.

PRELIMINARY MATTERS

Mr. Escalante requested a postponement of the hearing for the purpose of obtaining representation by counsel. Mr. Martin and the Claimant objected to this request. Mr. Martin stated that Commission's exhibit 3, a letter from the Commission's Executive Director to Mr. Escalante, dated July 15, 2010, previously notified him that he had a right to representation by counsel at the Exceptions hearing. The penultimate paragraph of that letter states, in pertinent part:

“A party may be represented by an attorney licensed to practice law in Maryland. If you wish to hire an attorney to represent you, you should arrange legal representation prior to the hearing, and as soon as possible. If you appear for the hearing without an attorney, no continuance will be granted in order to allow you additional time to hire legal counsel...”

Mr. Escalante was also advised in the July 15, 2010 letter from the Commission that:

“A postponement request must be made in writing, and will be considered only if it is received by the agency not less than ten (10) days before the scheduled date of the hearing. The request shall set forth the reason for the request, and will be granted only for good cause.”

The July 15, 2010 letter from the Commission was mailed to Mr. Escalante at the address he noted on his July 12, 2010 letter to the Commission in which he filed Exceptions. The Commission concluded that Mr. Escalante had been provided with

notice that if he appeared at his Exceptions hearing without an attorney, a continuance would not be granted to allow him to obtain representation. The Commission further concluded that Mr. Escalante failed to cite any extenuating circumstances which would warrant a postponement and elected to proceed with the Exceptions hearing.

Mr. Escalante contended that he did not receive notice of the March 4, 2010 hearing conducted before the ALJ, at the Office of Administrative Hearings, which resulted in the ALJ's Proposed Decision and Order. Mr. Martin stated that the Notice of Hearing sent to the Respondent regarding the March 4, 2010 hearing at the Office of Administrative Hearings, was sent, by certified mail, to the address listed in the Commission's licensing record for Mr. Escalante in accordance with the provisions of Section 17-324(d), Business Occupations and Professions ("Bus. Occ. & Prof.") Article, *Annotated Code of Maryland*. (See Real Estate Commission's Exhibits 1 and 3 entered at the hearing before the ALJ.) In addition, Mr. Martin stated that the notice was also sent to Mr. Escalante by regular mail. Mr. Escalante acknowledged that the address on the Notice of Hearing is the address on his real estate license and is current. He stated that he was out of the country at the time of the hearing before the ALJ and never received notice of the hearing. However, he did not offer any evidence to support that assertion.

Mr. Martin cited the Court's holding in *Golden Sands Club v. Waller*, 313 Md. 484, 500 (1988), and argued that, in dealing with the notice requirements of procedural due process, actual receipt of a notice of hearing is not the test. Rather, the Court held, the question is whether the method chosen for providing notice is reasonable. Mr. Martin argued that the provisions of Section 17-324(d), Bus. Occ. & Prof. Article, *Annotated Code of Maryland*, which provide for notification of a hearing to a Real Estate

Commission licensee by means of certified mail sent to the last known business address of the licensee, are a reasonable method of providing notice. He stated that if Mr. Escalante knew he was going to be out of the country for a period of time, he should have made arrangements for someone to review his mail.

The Commission concluded, based on the evidence and testimony presented, that Mr. Escalante was properly notified of the hearing before the ALJ on March 4, 2010 but failed to appear and participate.

Mr. Escalante proffered testimony, in his July 12, 2010 letter to the Commission filing Exceptions, regarding the incidents which formed the basis for the Commission's charges against him and Ms. Dillard's guaranty fund claim, which he would seek to introduce at the Exceptions hearing. (See Commission's Exhibit 2.) Mr. Martin objected to the presentation of testimony by Mr. Escalante before the Commission which was not presented at the hearing before the ALJ. He argued that the testimony proffered in the July 12, 2010 letter could have been presented before the ALJ and to permit its introduction at the Exceptions hearing would be improper. Mr. Escalante was notified in the Commission's letter to him of July 15, 2010 that, if a transcript was not provided to the Commission at least ten days prior to the hearing, he would be bound by the factual findings in the Proposed Order. (Mr. Escalante did not provide a transcript of the hearing before the ALJ to the Commission.) He was also advised in that letter that any evidence that was not presented at the hearing before the ALJ, including testimony, could not be introduced or referred to at the Exceptions hearing. The Commission concluded that the testimony which Mr. Escalante sought to introduce at the Exceptions hearing could have been presented by him at the hearing before the ALJ and did not meet the criteria for

introduction of additional evidence set forth in *Code of Maryland Regulations* (“COMAR”) 09.01.03.09K. Therefore, the Commission denied Mr. Escalante’s request to provide testimony which would dispute the findings of fact made by the ALJ.

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

At all times relevant to this matter, the Respondent was licensed as a real estate broker with the Commission. FF1.¹ The property in question, 9823 Tolworth Circle (“the Property”), was owned by Noberto Ascencio (“Seller”). FF2. On or about May 8, 2006, the Seller and the Respondent entered into a written, but unexecuted, agreement whereby the Respondent agreed to purchase the Property for \$47,000.00, with \$10,000.00 down and \$37,000.00 due within ninety days; agreed to bring the mortgages on the Property current and maintain the mortgage payments while the Property was listed, and until it was sold; and agreed to make any necessary repairs to the Property. FF3. The Respondent would retain all of the proceeds from the sale of the Property after the existing mortgages had been satisfied. FF3. On the same day, the Respondent wrote a check to the Seller, in the amount of \$10,000.00 and also wrote checks in the amounts of \$4,268.79 and \$7,132.49 to pay the delinquent amounts on the Seller’s first and second mortgages on the property. FF3. On May 16, 2006, the Seller gave the Respondent

Power of Attorney which was filed in the Land Records of Baltimore County. FF4. The Respondent hired a contractor, Donald Oyola, to perform renovations on the Property. FF5. Mr. Oyola, and the subcontractors he hired, performed all of the renovations on the Property. FF5. At all times relevant to this matter, Mr. Oyola was not licensed as a home improvement contractor by the Maryland Home Improvement Commission. FF6. The Respondent and Mr. Oyola handled all matters relating to renovations of the Property. FF7. On May 16, 2006, the Claimant entered into a contract with the Respondent for the purchase of the Property for \$300,000.00. FF8. The Respondent acted as the Seller's agent. FF11. In an addendum to the contract, the Claimant listed numerous items requiring repair or replacement prior to settlement. Those items included: The installation of new windows on the first and second floor, except for two bay windows; the installation of top and bottom kitchen cabinets, stove, refrigerator, dishwasher and a ceramic tile floor in the kitchen; the installation of a toilet, sink and ceramic tile in a half-bath; the installation of a sink and ceramic tile in the master bath; the installation of a tub, toilet, sink, light fixtures, ceiling and ceramic tile in a full hallway bath; the installation of ceramic tile in the foyer and family room; the installation of new interior doors, closet doors and a front entrance door; painting of the outside siding; painting of the basement walls and floor; and painting of the interior of the Property. FF9. The Claimant waived a mold inspection. FF10. Settlement on the Claimant's existing home and the Property was scheduled for May 31, 2006 but was changed to June 16, 2006 when the Claimant's buyers could not meet the May 31, 2006 date. When settlement did not occur on June 16, 2006, the Respondent relisted the Property at \$325,000.00. The Claimant offered the Respondent \$305,000.00 for the Property and this offer was accepted on June 16, 2006

¹ "FF" refers to the ALJ's Findings of Fact.

Settlement on the Property was extended until June 20, 2006, again until June 21, 2006 and finally occurred on June 22, 2006. FF13. Prior to completion of the renovations, the Claimant had a home inspection performed on the Property, on May 30, 2006, which did not reveal any structural or mechanical problems. FF14. The Claimant frequented the Property during the renovations. FF15. Just prior to settlement on June 22, 2006, the Claimant signed a waiver of her right to a walk-through and accepted the Property in “as-is” condition, with the exception of the gutters. The Seller agreed to replace the gutters by June 24, 2006. FF17. Shortly after moving into the Property, on June 23, 2006, the Claimant discovered problems with some of the renovations. These problems were: The kitchen cabinet doors were poorly hung, cabinet shelves were missing, countertops lacked finished sides, and the dishwasher was installed unevenly; a replacement window in a bedroom did not match the others; the drain in the bathtub was never installed; the pipe in the master bathroom leaked; the kitchen sink leaked and an incorrect pipe had been installed; the tile floors were uneven and of sub-standard quality; the gutters were not replaced; the air conditioner malfunctioned within two weeks; and water seeped into the basement as a result of a broken sump pump, causing mold and mildew. FF19. When the Claimant called the Respondent regarding the renovation problems, she was told the contractor was out of the country. When the contractor did go to the Property, he replaced one gutter and painted the rest. FF20. The Claimant paid for a plumber to repair the faulty tub drain, kitchen drain, leaking under the bathroom sink, and to correctly install the dishwasher. The Claimant paid \$1,187.00 for these repairs. FF21. The Claimant obtained an estimate, in the amount of \$957.71, from a licensed contractor to repair and replace the kitchen countertops, gutters and downspouts. FF 22. The

Claimant could not file a Maryland Home Improvement Commission guaranty fund claim to recover the \$1,187.00 she paid to the plumber, nor the estimated \$957.71 to replace/repair the kitchen countertops, gutters and downspouts, because Mr. Oyola was not licensed to perform home improvement work by that Commission. FF26. The ALJ found that the Claimant's following real estate guaranty fund claims were not compensable: \$2,500.00 to waterproof the basement and \$510.00 to replace the sump pump, in February, 2008; \$284.00 for a service call to repair the air conditioning; and \$5,000.00 for the increase in the contract price. FF23,24, 25.

The Respondent was charged with violating Section 17-322(b)(25) Bus. Occ. & Prof. Article, *Annotated Code of Maryland* as well as COMAR 09.11.02.02D. Section 17-322(b)(25) authorizes the Commission to deny a license, reprimand a 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;”

COMAR 09.11.02.02D provides:

“D. Disclosure Requirement.

- (1) The licensee may not acquire an interest in, or purchase, personally, for any member of the licensee's immediate family, for the licensee's firm, for any member of the firm, or for any entity in which the licensee has any ownership interest, property listed with the licensee or the licensee's firm without making the licensee's true position known to the listing owner. In selling or leasing property in which the licensee, the licensee's firm, or any member of the licensee's immediate family or the licensee's firm has an ownership interest, the licensee shall reveal that interest in writing to all parties to the transaction.”

The Respondent demonstrated incompetency by having an unlicensed contractor perform the renovations on the Property. It was undisputed at the hearing before the ALJ that the workmanship of some of the renovations performed by Mr. Oyola, the unlicensed

contractor hired by the Respondent, was below standards and required repair. Further, although the Respondent agreed to replace the gutters on the Property, he failed to do so. The Respondent's failure to hire a licensed contractor resulted in faulty work done throughout the property and in financial harm to the Claimant. The Respondent also failed to promptly provide the Claimant with information regarding the contractor who had worked on the Property when he was notified that repairs, which were to have been made, either were not made or were poorly performed. Since the Seller was not directly involved in the renovation process and the Respondent had a financial stake in the sale of the Property, the Respondent had a duty to assure that the renovations to the Property were performed by a competent, licensed contractor and to provide the Claimant with the information she sought regarding the contractor he had hired. The Respondent's failure to hire a licensed contractor to perform renovations and repairs to the property; his failure to provide the Claimant with assistance in rectifying Mr. Oyola's substandard renovations, despite repeated requests; and his failure to assure that the gutters were replaced, as agreed, also indicates bad faith on his part in his dealings with the Claimant. The Commission, therefore, concludes that the Respondent's conduct violated Section 17-322(b)(25), Bus. Occ. & Prof. Article, *Annotated Code of Maryland*.

Based on the evidence and testimony presented at the hearing before the ALJ, it is clear that the Respondent had a financial interest in the Property greater than that of a mere listing and selling agent. The Respondent and the Seller had agreed that the Respondent would bring the Property's delinquent mortgage payments current, would make the mortgage payments on the Property until it was sold, and would pay the Seller \$37,000.00 in addition to an initial payment of \$10,000.00. The Respondent, under his

agreement with the Seller, was free to sell the Property and retain 100% of the proceeds from the sale. The Seller even gave the Respondent a Power of Attorney with respect to the Property to assist him in his endeavors to sell it. The Respondent hired the contractor and was responsible for overseeing the renovations on the Property, tasks normally performed by a seller. Under the provisions of COMAR 09.11.02.02D, the Respondent had an affirmative duty to disclose, in writing, to the Claimant that he had a financial interest in the Property beyond the receipt of a commission from the sale. The Claimant testified at the hearing before the ALJ that she never knew that the Respondent had a financial interest in the Property other than receiving a commission on its sale. The Respondent violated COMAR 09.11.02.02D by failing to make the required written disclosure of his financial interest in the Property to the Claimant. His failure to make the required written disclosure is also further evidence of his bad faith in dealing with the Claimant.

To determine the penalty which should be imposed for the Respondent's violations of Section 17-322(b)(25), Bus. Occ. & Prof. Article, *Annotated Code of Maryland*, and COMAR 09.11.02.02D, the Commission is required under Section 17-322(c), Bus. Occ. & Prof. Article, *Annotated Code of Maryland*, to consider the following factors:

- (1) the seriousness of the violation;
- (2) the harm caused by the violation;
- (3) the good faith of the licensee; and
- (4) any history of previous violations by the licensee.

The Respondent's violations are serious. The Respondent failed in his duty to

disclose to the Claimant his financial interest in the Property. He hired an unlicensed contractor to perform work on the Property and when the renovations proved to be sub-standard, he failed to assist the Claimant in resolving the problems. He also agreed to replace the gutters on the Property, but failed to do so. As a result of the Respondent's conduct, the Claimant suffered harm; she purchased a home with incomplete, sub-standard renovations performed by an unlicensed contractor and she had to hire other contractors, at her own expense, to correct the poor workmanship. The Respondent's actions throughout the transaction evidence his lack of good faith and fairness in his dealings with the Claimant. In fact, the purpose of the Real Estate Commission's regulatory statute and associated regulations is to protect members of the public from the behaviors engaged in by the Respondent in providing real estate brokerage services to the Claimant. *See Gross v. Sussex Incorporated*, 332 Md. 247, 274 (1993). The ALJ found that the Respondent has had two prior violations and that one of the violations involved issues similar to those in this case.

Based on an evaluation of the factors set forth in Section 17-322(c), Bus. Occ. & Prof. Article, *Annotated Code of Maryland*, the Commission concludes that the Respondent's misconduct warrants the imposition of the maximum \$5,000.00 civil penalty for each violation, for a total penalty of \$10,000.00 and the suspension of the Respondent's real estate license for a period of sixty days.

Section 17-404, *Bus. Occ. & Prof. Article*, *Annotated Code of Maryland* permits a person to recover compensation from the Real Estate Guaranty Fund for an actual loss, based on an act or omission that occurs in the provision of real estate brokerage services by a licensed real estate broker such as the Respondent. The act or omission which is the

basis for the claim must be one in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or that constitutes fraud or misrepresentation.

The Claimant sought awards from the Fund as follows: \$5,000.00 which the Claimant paid to the Respondent over and above the original contract price; \$2,500.00 to waterproof the basement; \$510.00 to replace the sump pump; \$284.00 for a service call to repair the air conditioning after settlement; \$957.71 to replace kitchen countertops, gutters and downspouts; and \$1,187.00 to correct faulty plumbing. The ALJ concluded that the Claimant was not entitled to compensation for the \$5,000.00 paid above the original contract price because the Claimant freely and voluntarily bargained with the Respondent to extend the settlement date on the Property for the \$5,000.00 increase in the contract price. Likewise, the ALJ concluded that the Claimant was not entitled to compensation for waterproofing the basement since she had waived her right to a mold inspection which could have disclosed any basement water issues. The sump pump was not replaced until twenty-one months after the Claimant purchased the property and the ALJ concluded that the cost of its replacement is not compensable from the Fund. Further, the ALJ determined that the service performed on the air conditioning unit several days after settlement was not compensable. The ALJ found that the service work performed on the air conditioning unit appeared to have been normal, routine maintenance and there was no clause in the original contract or any addenda thereto guaranteeing that the unit would be in good, working condition beyond the settlement date. The Commission concurs with the ALJ's recommended decision that these costs are not compensable from the Fund.

The Commission further concurs with the ALJ's recommended decision that, as a result of the Respondent's acts and omissions, the Claimant suffered an actual loss of \$2,144.71, when she had to hire contractors to replace kitchen countertops, gutters and downspouts and to correct faulty plumbing. The actual loss was due to the facts that the Respondent entered into a contract addendum with the Claimant to perform certain renovations and repairs on the Property; hired an unlicensed contractor to perform those renovations; and, when the renovations or repairs were either not performed or performed in a sub-standard manner, failed to provide the Claimant with information which would have allowed her to contact the contractor and attempt to have the necessary repairs made.

ORDER

It is this 10 day of DECEMBER, 2010 **ORDERED**

that:

1. The Respondent, Jorge W. Escalante, violated Md. Bus. Occ & Prof. Art. §17-322(b)(25) and (33) and COMAR 09.11.02.02D;
2. All real estate licenses held by the Respondent, Jorge W. Escalante, are suspended for sixty (60) days;
3. The Respondent, Jorge W. Escalante, is assessed a civil penalty in the amount of Ten Thousand Dollars (\$10,000.00), which shall be paid within thirty (30) days of the date of this Order;
4. The claim of Betty J. Dillard against the Maryland Real Estate Guaranty Fund is granted in the amount of Two Thousand One Hundred Forty-Four Dollars and Seventy-One Cents (\$2,144.71);

5. All real estate licenses held by the Respondent, Jorge W. Escalante, are suspended until the civil penalty is paid and the Maryland Real Estate Guaranty Fund is repaid in full, including any interest that is due, and that this suspension is in addition to, and not in lieu of, the sixty days disciplinary suspension; and

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

MARYLAND REAL ESTATE COMMISSION

(COMMISSIONER'S SIGNATURE
APPEARS ON ORIGINAL ORDER)

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2010/11
By [Signature]

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 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.

JORGE W. ESCALANTE
RESPONDENT

AND

CLAIM OF BETTY J. DILLARD
AGAINST THE REAL ESTATE
COMMISSION GUARANTY FUND

* BEFORE M. TERESA GARLAND
* ADMINISTRATIVE LAW JUDGE,
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH No: DLR-REC-24-09-21870
* REC CASE NO: 2007-RE-697

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PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated May 25, 2010, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 16th day of June, 2010.

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

6-16-2010
Date

By

(COMMISSIONER'S SIGNATURE
APPEARS ON ORIGINAL ORDER)



MARYLAND REAL ESTATE
COMMISSION

v.

JORGE W. ESCALANTE,
RESPONDENT,

AND THE CLAIM OF

BETTY J. DILLARD AGAINST THE
REAL ESTATE COMMISSION
GUARANTY FUND

* BEFORE M. TERESA GARLAND,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS

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OAH CASE No: DLR-REC-24-09-21870

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COMPLAINT No.: 2007-RE-697

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PROPOSED DECISION

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

STATEMENT OF THE CASE

On June 9, 2009, the Maryland Real Estate Commission (Commission or REC) ordered a hearing on (1) charges against Jorge W. Escalante (Respondent) for alleged violations of section 17-322(b)(25) of the Business Occupations and Professions Article of the Annotated Code of Maryland and the Code of Maryland Regulations (COMAR) 09.11.02.02D, and (2) a claim by Betty J. Dillard (Claimant) against the Commission's Guaranty Fund (Fund) for reimbursement for an alleged actual loss caused by the Respondent's misconduct.

On March 4, 2010, I held a hearing at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Jessica Berman Kaufman, Assistant Attorney General, represented the

Commission. The Claimant represented herself. The Respondent did not appear. Kris King, Assistant Attorney General, represented the Guaranty Fund.

The Administrative Procedure Act, the Office of Administrative Hearings' Rules of Procedure, and the Commission's Hearing Regulations govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); COMAR 28.02.01; and COMAR 09.01.03, respectively.

ISSUES

The issues are:

1. Did the Respondent engage in conduct that demonstrated bad faith, incompetency, or untrustworthiness, or that constituted dishonest, fraudulent, or improper dealings?
2. Did the Respondent have an interest in the property listed and, if so, did the Respondent fail to reveal that interest in writing to all parties to the transaction?
3. Did the Claimant suffer an actual monetary loss as a result of the Respondent's conduct, which constituted theft, embezzlement, forgery, false pretenses, fraud or misrepresentation?

SUMMARY OF THE EVIDENCE

Exhibits

The following were admitted for the Commission:

- | | |
|---------|--|
| MREC #1 | Notice of Hearing, December 23, 2009, unclaimed by Respondent, with Statement of Charges and envelope |
| MREC #2 | Transmittal |
| MREC #3 | DLLR licensing screen printouts regarding Respondent |
| MREC #4 | Settlement Agreement and Consent Order, Complaint No. 00-RE-288, February 15, 2003 |
| MREC #5 | Consent Order and Settlement Agreement, Complaint No. 2000-RE-135, February 13, 2004 with attached records including Recommended Decision, March 3, 2003 |
| MREC #6 | Letter to Whom It May Concern from Steven Smitson, March 3, 2010 |

- MREC #7 REC Report of Investigation, case 07-RE-0697, closed January 21, 2009 including records
MREC #8 Supplemental REC Report of Investigation, February 6, 2009

The following were admitted for the Claimant:

- CL #1 Photograph of countertop
CL #2 Photograph of countertop
CL #3 Photograph of cabinet base
CL #4 Photograph of countertop base
CL #5 Photograph of countertop
CL #6 Photograph of countertop
CL #7 Photograph of kitchen cabinet door
CL #8 "Extras" printout from Allied Restoration, Inc.
CL #9 Proposal from Oriole Basement Waterproofers, Inc., July 7, 2006
CL #10 Packet of plumbing losses receipts from Catons and Len the Plumber

No other documents were admitted into evidence.

Testimony:

William Reynolds, Investigator, testified for the Commission.

The Claimant testified on her own behalf.

FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. At all times relevant to this matter, the Respondent was licensed as a real estate Broker with the Commission, license number 01-322271.
2. The Property in question, 9823 Tolworth Circle (the Property), was owned by Norberto Ascencio (Seller).
3. On or about May 8, 2006, the Seller and the Respondent entered into a written, but unexecuted, agreement whereby the Respondent agreed to purchase the Property for \$47,000.00, with \$10,000.00 down and \$37,000.00 due within ninety days. Additionally, the Respondent would bring the mortgages on the Property current and maintain the mortgage payments while the Property was listed and until it was sold by the Respondent. The Seller also agreed to make any necessary repairs to the

property in anticipation of the Respondent's "assignment" of the contract. In exchange, the Respondent would retain all proceeds from the sale of the Property after the existing mortgages had been satisfied. (MREC Ex. #7, insert 4.) On that same date, the Respondent wrote three checks: one in the amount of \$10,000.00 directly to the Seller with a notation "contract down payment," and two checks in the amounts of \$4,268.79 and \$7,132.49 to pay the delinquent amounts of the Seller's first and second mortgages on the Property.

4. On May 16, 2006, the Seller gave the Respondent Power of Attorney with respect to the Property. (MREC Ex. #7, insert 7.) This Power of Attorney was filed in the Land Records in the Baltimore County Circuit Court.
5. The Respondent hired a contractor, Donald Oyola, to perform the renovations on the Property. Mr. Oyola, and the subcontractors he hired, performed all of the renovations on the Property. (MREC Ex. #7, insert 3.)
6. At all times relevant to this matter, Mr. Oyola was not licensed as a home improvement contractor with the Maryland Home Improvement Commission (MHIC). (MREC Ex. #6.)
7. All matters dealing with the renovations on the Property were handled by the Respondent and Mr. Oyola.
8. On May 16, 2006, the Claimant entered into a contract with the Respondent for the purchase of the Property for \$300,000.00. (MREC Ex. #7, insert #2.)
9. As an addendum to the contract, the Claimant listed numerous items requiring repair or replacement prior to settlement. (MREC Ex. 7, insert #2, Addendum #9.) Those items were:

- Install new windows in first and second floor except two bay window (sic);

- Install top and bottom kitchen cabinets, stove, refrigerator, dishwasher, install ceramic tile floor;
 - Install toilet and sink in half-bath, and install ceramic tile;
 - In master bath, install sink and ceramic tile (shower remains the same);
 - In full hallway bath, install tub, toilet, sink, light fixtures, complete ceiling and install ceramic tile;
 - Install ceramic tile in foyer and family room;
 - Install new interior doors and closet doors and front entrance door;
 - Paint outside siding;
 - Basement floor to be painted gray and walls white;
 - Paint interior of house.
10. The Appellant waived a Mold Inspection. (MREC Ex. 7, insert #2, Addendum #2.)
 11. The Respondent acted as the Seller's agent.
 12. The Claimant had a contract on her existing home and settlement on both properties was scheduled for May 31, 2006. However, that date was changed until June 16, 2006 because the Claimant's buyers could not meet the May 31, 2006 date. The June 16, 2006 settlement date was unsuccessful as well.
 13. When the second settlement date was not met, the Respondent relisted the Property the higher price of \$325,000. The Claimant contacted the Respondent and informed him that she could not meet the new price and offered \$305,000.00, which the Respondent accepted on June 16, 2006. (MREC Ex. 7, Addendum #11.) The settlement date was extended until June 20, 2006, and again until June 21, 2006. The settlement finally occurred on June 22, 2006.
 14. On May 30, 2006, the Claimant had a home inspection performed on the Property. The home inspection was done prior to the completion of the renovations and did not reveal any structural or mechanical problems with the Property.
 15. The Claimant frequented the Property during the renovations.

16. The settlement on the Property and the Claimant's home occurred on June 22, 2006. The settlement on the Claimant's home occurred in the early part of the day and the settlement on the Property occurred in the evening.
17. Just prior to settlement on the Property, the Claimant signed a waiver of her right to a walk-through and accepted the Property in "as-is" condition, with the exception of the gutters. The Seller agreed to replace the gutters by June 24, 2006. (MREC Ex. #7, insert 2, Addendum #12.)
18. The Claimant moved into the Property on June 23, 2006.
19. Shortly after moving into the Property, the Claimant discovered problems with some of the renovations. These problems were:
 - The kitchen cabinet doors were poorly hung, cabinet shelves were missing, countertops lacked finished sides, and dishwasher was installed unevenly;
 - A replacement window in a bedroom did not match the others;
 - The drain in the bathtub was never installed;
 - The pipe in the master bathroom sink leaked;
 - The kitchen sink leaked and an incorrect pipe had been installed;
 - Tile floors were uneven and of sub-standard quality;
 - Gutters were not replaced;
 - The air conditioner malfunctioned within two weeks;
 - Water seeped into the basement as a result of a broken sump pump, causing mold and mildew.
20. The Claimant called the Respondent regarding the issues and was told the contractor was out of the country. When the contractor did go to the Property, he replaced one gutter and painted the rest.
21. The Claimant paid for a plumber to repair the faulty tub drain, kitchen drain, leaking under bathroom sink, and correctly install the dishwasher. The total amount paid for these corrections was \$1,187.00. (Cl. Ex. #10.)

22. The Claimant obtained an estimate from a licensed contractor to repair and replace the kitchen countertops and the gutters and downspouts. The total estimated amount for these corrections was \$957.71. (Cl. Ex. #8.)
23. The Claimant obtained an estimate of \$2,500.00 to waterproof the basement and had the sump pump replaced in February 2008 at a cost of \$510.00. (Cl. Exs. #9 and #10)
The Claimant's claim for the sump pump and basement waterproofing is not compensable.
24. Two days after moving into the Property, the air conditioning required servicing. The Claimant paid \$284.00 for the service call to repair the air conditioning. The Claimant's claim for the malfunctioning air conditioning is not compensable.
25. The Claimant's claim for reimbursement of the \$5,000.00 increase in contract price is not compensable.
26. The Claimant could not file a MHIC claim to recover the \$1,187.00 she paid to correct the faulty plumbing and the estimated \$957.71 to replace/repair the items set forth in Finding of Fact #22 because Mr. Oyola was not licensed to do home improvement work with the MHIC.

DISCUSSION

The Commission, as the moving party on the Charges, has the burden of proving that the Respondent violated the statutory and regulatory sections at issue; the Claimant, as the moving party on the claim, has the burden of proving that she suffered an actual loss as the result of the Respondent's misconduct, all by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009); *Maryland Comm'r of Labor and Industry v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996) (quoting *Bernstein v. Real Estate Comm.*, 221 Md. 221, 231 (1959)). For

the reasons discussed below, I find that the Commission met its burden of proving the Charges and the Claimant met her burden with respect to part of the claim.

The Regulatory Charges

The Commission has charged the Respondent with violating the following sections of its regulatory statute and regulations:

Section 17-322(b)(25) of the Business Occupations and Professions Article of the Annotated Code of Maryland provides, in pertinent part, as follows:

(b) Subject to the hearing provisions of § 17-324 of this subtitle, the Commission 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....

Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(25) (Supp. 2009).

COMAR 09.11.02.02D provides, in pertinent part, that:

D. Disclosure Requirement.

(1) The licensee may not acquire an interest in, or purchase, personally, for any member of the licensee's immediate family, for the licensee's firm, for any member of the firm, or for any entity in which the licensee has any ownership interest, property listed with the licensee or the licensee's firm without making the licensee's true position known to the listing owner. In selling or leasing property in which the licensee, the licensee's firm, or any member of the licensee's immediate family or the licensee's firm has an ownership interest, the licensee shall reveal that interest in writing to all parties to the transaction.

...

The Commission contends that the Respondent was dishonest with the Claimant when he failed to inform the Claimant, in writing, that he had a financial interest in the Property, not just because of the commission he would receive from the sale, but also because he had contracted with the Seller to receive 100% of the proceeds of the sale of the Property. The Commission argues that

although the Seller was the owner of the Property, the Respondent had the Power of Attorney and it was the Respondent who hired the contractor and was responsible for overseeing all of the renovation work. In light of his financial stake and role with the renovation, the Commission argues that the Respondent should have taken steps to ensure that a licensed contractor performed the renovations on the Property. His failure to do so, as argued by the Commission, resulted in faulty work done throughout the Property, which resulted in harm to the Claimant. Further, the Commission contends that the Respondent had an obligation to deal fairly with the Claimant when she requested assistance from the Respondent in rectifying the unworkmanlike renovations, and the Respondent failed to provide the information and help she deserved.

The Respondent was not present at the hearing and thus had no response to the Claimant's allegations. He did, however, submit two written responses to inquiries of the Commission in July 2007. In his first response, dated July 3, 2007, the Respondent simply stated that he has had trouble locating the contractor he hired to renovate the Property and requested an extension of time in which to respond to the Commission. (MREC Ex. # 7, insert #3) In his second response, dated July 18, 2007, the Respondent denies any wrongdoing, chronicles the events leading up to settlement on the Property, and only addresses the renovation issues with the Property by saying, "as far as the gutters are concerned, I sent the contractor to do the work and I did not hear anything back from [the Claimant]." The Respondent also addressed his relationship with the Seller and admitted his financial interest in the Property.¹

The Claimant testified that she never knew that the Respondent had a financial interest in the Property other than receiving a commission on its sale. She further contended that the Respondent interfered with her relationship with a real estate agent she had contracted with prior to

¹ The Respondent attached documentation of his agreement with the Seller, the Power of Attorney, several checks and mortgage documents.

her dealings with the Respondent. The Claimant had initially submitted an offer on the Property, through her agent, of \$250,000.00 plus 6% cash back from the Seller to compensate for required renovations. According to the Claimant, that initial offer was neither rejected nor accepted by the Respondent. She simply heard nothing from the Respondent. Several weeks after her initial offer, the Property's listing expired and the Claimant inquired about the Property directly with the Respondent. The Complainant testified that the Respondent told her that if she brought an agent into the deal, the cost to her would be greater.² The Claimant also testified that when she waived a final walk-through of the Property just prior to settlement, she did so under duress because she felt she would be [temporarily] homeless unless she settled on the Property that day. While I am sympathetic to the Claimant's position, the responsibility for arranging for a final walk-through was not the Respondent's alone. The parties knew of the settlement date and there was no evidence presented by the Claimant that she made any effort to arrange for a walk-through with sufficient time before settlement to rectify any unfavorable condition. To the contrary, the Claimant's own settlement ran late, making settlement on the Property late as well. Hence, it is unclear when, on the day of settlement, the Claimant envisioned the walk-through occurring and what, if anything, she would do if issues arose during the walk-through.³

The documentary evidence and testimony presented by the Commission establishes that the Respondent was more than just a listing and selling agent for the Property. The Respondent had a financial stake in the Property that went beyond the potential for a commission. Rather, he secured a contractor to perform the renovations, a task normally left to the seller. In addition, the Respondent and the Seller had an agreement that the Respondent would bring the Property's

² The REC argued this point in its closing argument and the Claimant testified about it at some length. However, while I certainly would not condone such interference with the agent-client relationship, I do not find the issue dispositive in this case. As such, the discussion of this issue is limited.

³ I have, however, considered the walk-through issue when proposing sanctions against the Respondent since a previous complaint against the Respondent had a nearly identical issue.

delinquent mortgages current, maintain the Property's mortgage payment and pay the Seller an additional sum of \$47,000.00. In exchange, the Respondent would be free to sell the property and retain 100% of the proceeds of the sale. Moreover, the Seller executed a Power of Attorney to assist the Respondent in this endeavor.

Instead of having a licensed contractor perform the renovations, the Respondent had Mr. Oyola, who was not licensed with the MHIC, perform the renovations on the Property. As a result of Mr. Oyola's renovations, it was undisputed at the hearing that the quality of the workmanship of some of the renovations was below standards and had to be repaired. Although the Respondent did not address Mr. Oyola's licensing status in either of his written responses to the Commission, he certainly should have taken the appropriate steps to find out whether Mr. Oyola was in fact licensed or not. Regardless of whether he affirmatively knew that Mr. Oyola was not licensed with the MHIC or he failed to verify his licensing status, the Respondent demonstrated incompetency in having Mr. Oyola work on the Property. Additionally, the Respondent agreed to replace all of the gutters on the Property, which he did not.

Furthermore, once he became aware that the Claimant was having problems with the renovations, the Respondent did not follow through with the Claimant and provide her with information regarding Mr. Oyola or any other subcontractor that worked on the home. The Respondent's role with the Property was not limited to a listing and selling agent. As discussed previously, the Respondent had a significant financial interest in the Property; but for his financial capital in bringing the outstanding mortgages current and steps to secure a contractor, the Property would not have been sold. He had the duty and obligation to provide the Claimant with the information she sought, as the Seller was clearly not involved in the process.

The law imposes upon an individual licensed by the Commission the obligation to treat all parties in a real estate transaction competently, truthfully, and fairly. Md. Code Ann., Bus. Occ. &

Prof. § 17-322(b)(25); COMAR 09.11.02.02D. The Commission has established that the Respondent was incompetent when he failed to use a licensed contractor to renovate the Property and he had improper dealings with the Claimant when he ignored the Claimant's repeated requests for assistance in rectifying Mr. Oyola's substandard renovations. The Respondent also failed to disclose, in writing, that he had an interest in the Property. The Respondent's conduct violates section 17-322(b)(25) of the Business Occupations and Professions Article, as well as COMAR 09.11.02.02D.

Regulatory sanctions

The purpose of the Real Estate Commission's regulatory statute is "to protect the public in its dealings with real estate brokers, to place a duty of good faith and fair dealing on real estate brokers." *Gross v. Sussex Incorporated*, 332 Md. 247, 274 (1993). In addition to allowing for suspension, revocation or reprimand of a real estate agent, the Commission can also impose a financial penalty, not exceeding \$5,000.00, for each statutory violation. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c)(1). The Commission suggested that I consider recommending a thirty-day suspension of the Respondent's real estate license and an \$8,000.00 civil penalty.

Section 17-322(c) directs me to consider the seriousness of the violation, the harm caused by the violation, the Respondent's good faith, and any previous violations in determining the appropriate penalty. The Respondent showed a lack of good faith when he failed to assist the Claimant with the issues she was having with the Property's renovations and his failure to replace the gutters pursuant to Addendum #12. As a result of the Respondent's conduct, the Claimant suffered harm; she purchased a home that had incomplete renovations performed by an unlicensed contractor who did below-standard work, and she had to hire others to correct the poor workmanship. Although the Respondent was the only person who had knowledge as to who performed renovation work on the home, since he was the person who hired the contractor, the Respondent failed to complete the renovations prior to settlement on the Property and did not

follow through with the Claimant and provide the information and assistance she requested regarding poor and incomplete renovations to the Property.

Further, the evidence in this case establishes that the Respondent had a financial interest in the Property. His involvement with the renovations of the Property resulted in the hiring of an unlicensed contractor who performed below standard work on the Property, which resulted in additional expense to the Claimant.

Based on the above, I find that the Respondent's conduct demonstrates a complete lack of professional behavior in his dealings with the Claimant regarding a real estate transaction. As a result of his behavior, particularly with having an unlicensed contractor renovate the Property, the Respondent received a significant financial reward.

The Respondent has had two prior violations. In one violation, I find the issues so similar and parallel to the issues in the instant matter that the penalties suggested by the Commission are insufficient to deter future behavior. Hence, I find that the Respondent's misconduct warrants the maximum \$5,000.00 civil penalty for each violation (\$10,000.00 total) and a sixty-day suspension of the Respondent's real estate license.

Guaranty Fund Claim

The Claimant seeks \$10,154.71 from the Fund. There is no dispute that the Property required repair work after the Claimant moved in because of faulty plumbing, poorly installed kitchen countertops, and the Respondent's failure to replace the gutters. While the parties do not dispute the repair work, a dispute does exist as to whether recovery from the Fund is appropriate.

The Fund opposes any recovery, arguing that the Claimant failed to show that her loss was attributed to the Respondent's conduct. Instead, the Fund argues that the Claimant has established that her loss was due to the work performed by Mr. Oyola and not due to any fraud, misrepresentation, or deceit by the Respondent. Furthermore, the Fund argues that the Seller was

responsible for the repairs and that it was not reasonable for the Claimant to assume that the Respondent was responsible for repairs to the Property after the Claimant moved in. The Fund further argues that the \$5,000.00 the Claimant paid to the Respondent over and above the original contract price was in consideration for the extension of the settlement date on the Property. I agree, in part, with the Fund's position. With respect to the additional \$5,000.00, the Claimant freely and voluntarily bargained with the Respondent to extend the settlement date on the Property. The Claimant had missed a number of settlement dates due to problems she encountered with the purchasers of her home. Without settling on her home, she could not settle on the Property. After having two settlement dates fail, the Respondent relisted the Property and the Claimant increased her offer by \$5,000.00 to prevent another buyer from contracting on the Property. I find that she is not entitled to compensation of \$5,000.00 for her subsequent, higher offer. Moreover, I find that the Claimant is not entitled for compensation for the sump pump she had replaced some twenty-one months after she purchased the Property. The Claimant waived her right to a mold inspection of the Property, which waiver may have eliminated any opportunity to discover basement water issues prior to settlement on the Property.⁴ Likewise, she is not entitled to compensation for waterproofing the basement. Finally, the Claimant is not entitled to compensation for service performed on the air conditioning unit as the work appears to have been normal, routine maintenance associated with upkeep of the unit and, further, there was no clause in either the original contract or any addendum thereto guaranteeing the functionality of the air conditioning unit beyond the settlement date. However, for the reasons set forth below, I conclude that the Claimant has otherwise met her burden of proof on the claim.

A person may recover from the Fund an actual loss suffered as a result of an act or omission that constitutes fraud or misrepresentation by a real estate sales person involving a real

⁴ There was no evidence at the hearing that the basement had existing water issues.

estate transaction. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (2004). In this matter, in support of its regulatory charges, the Commission argues that the Respondent's misconduct caused an actual harm to the Claimant. Specifically, the Respondent hired an unlicensed contractor to perform home improvement work that was below standard and had to be repaired. Moreover, as argued by the Claimant, she suffered further harm when the Respondent failed to respond to the Claimant's repeated request for assistance and information regarding the contractor. The Fund disputes that the harm suffered, as argued by the Commission and Claimant, was related to the Respondent's actual misconduct and, therefore, an award should not be made.

I am not persuaded by the Fund's position that the Claimant failed to prove her claim. The Claimant established through her testimony that she believed, based on the Respondent's involvement with directing the work on the Property, that the renovations were being made by a professional. As established by the evidence in this case, Mr. Oyola was the contractor who was responsible for the renovations work and was placed in this position by the Respondent; however, Mr. Oyola was not licensed to perform home improvement work. Moreover, the Respondent's failure to provide the Claimant with any information on the contractor who performed work on the Property prevented the Claimant from directly contacting the contractor to attempt to rectify the situation. Since the Respondent did not respond to the Claimant's request for information, the Claimant was forced to hire other professionals and pay for the repairs.

Accordingly, as a result of the Respondent's incompetence and bad dealings in having an unlicensed contractor perform the renovations throughout the home, the Claimant suffered a financial loss. Specifically, the Claimant suffered an actual loss in the amount of \$2,144.71 when, as a result of the Respondent's acts and omissions in the sale of the Property, she had to hire other contractors to repair faulty plumbing, kitchen countertops, and gutters.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated Md. Code Ann., Bus Occ. & Prof. § 17-322(b)(25) and COMAR 09.11.02.02D.

I further conclude that the Respondent is subject to a fine and suspension of his license for violations of the Real Estate Law pursuant to Md. Code Ann., Bus. Occ. & Prof. § 17-322(c) (Supp. 2009).

Finally, I conclude that the Claimant is entitled to payment of \$2,144.71 from the Real Estate Guaranty Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-404 (2004).

RECOMMENDED ORDER

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

ORDER that the Respondent violated Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(25) (Supp. 2009) and COMAR 09.11.02.02D;

ORDER that the Respondent's real estate license be suspended for a sixty-day period and that he be fined in the amount of \$10,000.00 pursuant to Md. Code Ann., Bus. Occ. & Prof. § 17-322(c) (Supp. 2009);

ORDER that the Claimant's Guaranty Fund Claim against this Respondent be allowed in the amount of \$2,144.71 pursuant to Md. Code Ann., Bus. Occ. & Prof. § 17-404 (2004); and

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

ADMINISTRATIVE LAW JUDGE'S SIGNATURE
APPEARS ON ORIGINAL ORDER

May 25, 2010
Date Decision Issued

M. Yeresa Garland
Administrative Law Judge

MARYLAND REAL ESTATE
COMMISSION
v.
JORGE W. ESCALANTE,
RESPONDENT,
AND THE CLAIM OF
BETTY J. DILLARD AGAINST THE
REAL ESTATE COMMISSION
GUARANTY FUND

* BEFORE M. TERESA GARLAND,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS

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* OAH CASE No: DLR-REC-24-09-21870
* COMPLAINT No.: 2007-RE-697
*

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FILE EXHIBIT LIST

The following were admitted for the Commission:

- MREC #1 Notice of Hearing, December 23, 2009, unclaimed by Respondent, with Statement of Charges and envelope
- MREC #2 Transmittal
- MREC #3 DLLR licensing screen printouts regarding Respondent
- MREC #4 Settlement Agreement and Consent Order, Complaint No. 00-RE-288, February 15, 2003
- MREC #5 Consent Order and Settlement Agreement, Complaint No. 2000-RE-135, February 13, 2004 with attached records including Recommended Decision, March 3, 2003
- MREC #6 Letter to Whom It May Concern from Steven Smitson, March 3, 2010
- MREC #7 REC Report of Investigation, case 07-RE-0697, closed January 21, 2009 including records
- MREC #8 Supplemental REC Report of Investigation, February 6, 2009

The following were admitted for the Claimant:

- CL #1 Photograph of countertop
- CL #2 Photograph of countertop
- CL #3 Photograph of cabinet base
- CL #4 Photograph of countertop base
- CL #5 Photograph of countertop
- CL #6 Photograph of countertop
- CL #7 Photograph of kitchen cabinet door
- CL #8 "Extras" printout from Allied Restoration, Inc.

CL #9 Proposal from Oriole Basement Waterproofers, Inc., July 7, 2006
CL #10 Packet of plumbing losses receipts from Catons and Len the Plumber

No other documents were admitted into evidence.