

THE MARYLAND REAL ESTATE COMMISSION

FINAL ORDER

IN THE MATTER OF THE CLAIM * BEFORE WILLIAM SOMERVILLE,
 OF PETER MILLER * ADMINISTRATIVE LAW JUDGE
 AGAINST THE MARYLAND REAL * OF THE MARYLAND OFFICE OF
 ESTATE COMMISSION GUARANTY * ADMINISTRATIVE HEARINGS
 FUND * OAH No: DLR-REC-22-11-08411
 * REC CASE NO: 2009-RE-112 GF

NOV 21 2011

MARYLAND REAL ESTATE COMMISSION

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated August 15, 2011, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 26th day of September, 2011,

ORDERED,

- A. That the Findings of Fact in the Recommended Decision be, and hereby are, AFFIRMED;
- B. That the Conclusions of Law in the Recommended Decision be, and hereby are, APPROVED;
- C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;

and,

D. That the records, files and documents of the Maryland State Real Estate Commission reflect this decision.

MARYLAND STATE REAL ESTATE COMMISSION

SIGNATURE ON FILE

9/26/11
Date _____

By: _____
Anne S. Cooke, Commissioner

CLAIM * **BEFORE WILLIAM SOMERVILLE,**
OF PETER MILLER * **AN ADMINISTRATIVE LAW JUDGE**
AGAINST * **OF THE MARYLAND OFFICE**
* **OF ADMINISTRATIVE HEARINGS**
THE MARYLAND REAL * **OAH No.: DLR-REC-22-11-08411**
ESTATE COMMISSION GUARANTY * **REC No.: 09-RE-112**
FUND

* * * * *

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On September 3, 2008, Peter Miller (Claimant) filed a complaint and Guaranty Fund claim with the Maryland Real Estate Commission (REC or Agency) Guaranty Fund (Fund) in the amount of \$59,503 for monetary losses alleged to have been incurred as a result of the misconduct of Scott Neff (Respondent), who was a licensed real estate agent affiliated with a broker, Keller Williams Select Realtors.

On May 17, 2011, a hearing in the matter was held at the Office of Administrative Hearings (OAH), in Hunt Valley, Maryland, before William Somerville, Administrative Law Judge (ALJ). Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2010). Hope Sachs, Assistant Attorney General, represented the Fund. The Claimant was present and represented himself. The Respondent was present and represented himself.

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. 2010); Code of Maryland Regulations (COMAR) 09.01.03 and 28.02.01.

ISSUE

The issue in this case is whether the Claimant sustained an "actual monetary loss" compensable by the Fund based upon acts or omissions of the Respondent which constitute misrepresentation pursuant to the applicable statute and regulation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (2010) and COMAR 09.11.03.04.

SUMMARY OF THE EVIDENCE

Exhibits

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

1. Notice of Hearing
2. Order for Hearing, 1-28-11
3. REC licensing data for Respondent, 5-12-11
4. Claimant's claim form, 9-3-08

The Claimant offered the following exhibits that were admitted:

1. Advertisement
2. Note, 5-11-07
3. Listing contract documents, 5-21-07
4. Purchase agreement document, 5-12-07
5. E-mail correspondence, 8-6-07
6. HUD statement, dated 10-8-08

7. DLLR note, 5-10-10
8. Thread of e-mail messages, 8-25-07
9. Thread of e-mail messages, 12-3-07
10. Expense breakdown document
11. SunTrust Mortgage payoff statement, 3-12-08
12. Property tax document, 2-1-08
13. Utility bills
14. Water/sewer bills
15. Homeowner's Insurance policy bill
16. Settlement Statement, 3-27-08

Testimony

The Claimant testified in his case. The Respondent testified for himself. The Fund presented no testimony.

FINDINGS OF FACT

After considering the demeanor of witnesses, testimony, and the other evidence submitted, I find the following facts by a preponderance of the evidence:

1. At all times relevant to this proceeding, the Respondent was licensed by the Maryland Real Estate Commission as a real estate agent. He was associated with Keller Williams Select Realtors® in an office near Annapolis.
2. Before May 12, 2007, the Claimant received in the mail a real estate solicitation from the Respondent. The advertisement said that the Respondent would sell one's home quickly and there would be a "Guaranteed Cash Offer for No Less than 95% of the Market Value*." The asterisk signified that "conditions applied." The advertisement further stated, "As Is No

Gimmicks On Time Closing.” The advertisement also stated, “Our special database of motivated buyers includes ... serious cash buyers. At least one of these hundreds of buyers will buy your home for cash – if they don’t we will, guaranteed up front in writing.”

3. On May 12, 2007, the Claimant met with the Respondent and, based on the advertisement, entered into a listing agreement with the Respondent. The Respondent agreed to sell the Claimant’s property for \$480,000.
4. At that same time, the parties also entered into a purchase agreement that contained all of the necessary terms, and that incorporated the terms and information from the listing agreement. In that agreement, the Respondent would pay 95% of \$480,000 -- that figure being \$456,000 -- for the property, and settlement would occur within 120 days of the “effective listing date.” The “effective listing date” set forth on the listing agreement was May 21, 2007. The purchase agreement was entitled “Scott Neff’s Guaranteed Sale Contract” and “Letter of Intent to Purchase Real Property.” The Claimant also agreed to “ratify any offers equal to or greater than this offer in purchase price.” It was estimated by the parties at that time that if a buyer offered \$456,000 for the property then the Claimant could “walk away from” the transaction with \$158,652 and the agent or agents would receive \$31,920 in commission.
5. On June 28, 2007, a potential buyer offered \$450,000. The Respondent suggested to the Claimant that he would forego \$9,000 in commission fees to allow the Claimant to obtain \$158,652 as proceeds of the transaction. The Claimant declined.
6. The promised settlement date in the “Guaranteed Sale Contract” -- September 18, 2007 -- came and went and the Respondent did not act on the agreement. He did not offer any more transaction documents and he did not go to settlement. He had no purchase money and he could not obtain a loan.

7. At no time did the Respondent have a third party obligated to perform his cash-offer purchase transaction in the event he failed to perform.
8. On February 10, 2008, after incurring many expenses since the time of the “Guaranteed Sale Contract” settlement date, the Claimant canceled the listing agreement with the Respondent and the broker.
9. Soon thereafter, the Claimant hired another broker. The Claimant reduced the sale price of the property and sold it. The contract of sale was executed on March 15, 2008, and settlement occurred on March 27, 2008. The final purchase price was \$414,000 and the Claimant paid, or gave credit for, an additional \$10,000 in closing costs.
10. On September 3, 2008, the Claimant filed a complaint with the Agency.

DISCUSSION

The REC maintains the Fund to protect those suffering financial losses due to misconduct by a licensed real estate broker or salesperson. *Lewis v. Long & Foster Real Estate, Inc.*, 85 Md. App. 754, 761, 584 A.2d 1325, 1329 (1991). The Maryland Court of Appeals has stated unequivocally that the plain language of the Maryland Real Estate Brokers Act makes clear that its purpose is to protect the public in dealings with those in the real estate profession and to place a duty of good faith and fair dealing on real estate professionals. *Gross v. Sussex, Inc.*, 332 Md. 247, 274, 630 A.2d 1156, 1170 (1993). In order to establish eligibility for any payment from the Fund, a claimant must establish that he or she suffered an actual monetary loss as a result of the conduct of a licensed broker or salesperson providing real estate brokerage services involving a transaction concerning real estate in Maryland. A claimant must establish not only the specific amount of the loss, but also that the loss was the result of theft or embezzlement of money or

property, or money or property unlawfully obtained from a person by false pretenses, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit. COMAR 09.11.03.04B.

The burdens of production and persuasion at a hearing on a Guaranty Fund claim are on the “claimant to establish the validity of the claim.” Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2010). With regard to elements of proof, a statute, Md. Code Ann., Bus. Occ. & Prof. § 17-404 (2010), governs all claims brought against the Fund, and sets forth criteria that must be established by the Claimant in order to obtain reimbursement.

That code section provides, in pertinent part:

§ 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

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (2010).

In the instant case, I conclude that the Claimant has established entitlement to reimbursement from the Fund. The Respondent was a licensed real estate broker, agent or salesperson, who acted in that capacity concerning property in Maryland. The Respondent

misrepresented that there would be a guaranteed cash offer for no less than 95% of the market value of the Claimant's property and misrepresented that if he could not find a buyer within the time frames set forth in the listing agreement, then he would purchase the property, guaranteed, up front, in writing. Those representations constituted misrepresentations, and by those misrepresentations, the Respondent obtained a valuable listing contract from the Claimant. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (2010).

"Guaranteed" means that there is a third party who is legally obligated to answer the debt or to perform for the party. *See Barron's Law Dictionary*: 208 (1984). The Respondent misrepresented in the advertisement, and in the initial meeting with the Claimant, that he had the capacity, guaranteed by another, to purchase the Claimant's property. He also misrepresented again in the "Guaranteed Sale Contract" transaction that he had the capacity, guaranteed by another, that he could purchase the property for \$456,000. In reality, the Respondent did not have the capacity to purchase and he never had another entity guarantying the transaction. The Claimant was induced to list the property with the Respondent based upon the misrepresentations. The Claimant lost time and money associated with the sale of his property based upon the Respondent's failure to have a guaranteed purchase transaction. The Claimant has satisfied his burdens. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a).

The Respondent argues that the Claimant breached the listing agreement such that the Respondent should not be held liable for the misrepresentations. This administrative action is not an action in contract; it is a civil, administrative case based on a statutory cause of action. *See* Md. Code Ann., Bus. Occ. & Prof. §§ 17-401 through 17-412 (2010) (statutory scheme). The Respondent's breach-of-contract defense alleging that at some point the Claimant stopped living in the property is irrelevant, and is otherwise unpersuasive. The Respondent treated the

entire transaction as if the listing contract had not been breached by the Claimant's failure to live in the house. The Respondent appeared to acquiesce to that condition, the Claimant returned to the property often to cut the grass and otherwise maintain the property, and the Respondent's initial misrepresentations pre-dated the time that the Claimant moved out of the home. I am not persuaded that the contractual defense offered by the Respondent is applicable in this case, or is credible. The Respondent's position is not persuasive.

With regard to reimbursement for "actual monetary loss," the statute limits payments to losses resulting from a proven claim. "The Commission may order payment by the Guaranty Fund only for the actual monetary loss suffered by the claimant as a result of the claim proven by the claimant." Md. Code Ann., Bus. Occ. & Prof. § 17-410(b)(1) (2010). Although not defined by statute, the Agency's regulations provide some insight into the meaning of the term "actual monetary loss" in COMAR 09.11.01.18:

.18 Amount of Compensation Recoverable from Real Estate Guaranty Fund.

The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund, pursuant to Business Occupations and Professions Article, Title 17, Subtitle 4, Real Estate Guaranty Fund, Annotated Code of Maryland, shall be restricted to the actual monetary loss incurred by the claimant, but may not include monetary losses other than the monetary loss from the originating transaction. Actual monetary losses may not include commissions owed to a licensee of this Commission acting in his capacity as either a principal or agent in a real estate transaction, or any attorney's fees the claimant may incur in pursuing or perfecting the claim against the guaranty fund.

Thus, the Administrative Law Judge is to consider losses "from the originating transaction" not including losses claimed for attorney fees or commissions.¹

Clearly, in the instant case, the actual monetary losses exceed the \$25,000 statutory limit, Md. Code Ann., Bus. Occ. & Prof. § 17-410(b), no matter how the losses are calculated. One

¹ The Claimant offered some exhibits with regard to consequential damages; I need not consider those.

method to calculate the loss is as follows:

\$456,000	gross amount the Claimant would have received but for the conduct
<u>\$31,920</u>	less anticipated commissions
\$424,080	net amount Claimant would have received but for the conduct

Subtract from that amount the amount that the Claimant actually realized as calculated below:

\$414,000	gross amount the Claimant actually realized
<u>\$23,840</u>	less commissions paid
\$390,160	net amount actually realized

The loss is \$424,080 minus \$390,160, which equals \$33,920. Because the statutory limit of “actual monetary loss” is \$25,000, the “actual monetary loss” in this case is \$25,000.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Facts and Discussion, I conclude, as a matter of law, that the Claimant has demonstrated an actual monetary loss in excess of \$25,000 as a result of the acts and omissions of the Respondent, and the Claimant is entitled to recover \$25,000 from the Guaranty Fund, pursuant to Md. Code Ann., Bus. Occ. & Prof. § 17-404, and COMAR 09.11.01.18. and 09.11.03.04.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, I **RECOMMEND** that the Maryland Real Estate Commission:

ORDER, that the Claimant, Peter Miller, be awarded the sum of \$25,000 from the Maryland Real Estate Commission Guaranty Fund based on the actual losses sustained as a result of the conduct of the Respondent, Scott Neff; and that it further

ORDER that the Respondent be ineligible for any real estate broker’s or agent’s license until such time as the Respondent has reimbursed the Guaranty Fund in full for the award paid to the Claimant pursuant to this Order, plus annual interest as set by law; and that it further

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

SIGNATURE ON FILE

August 15, 2011

Date mailed

WS/

#124970

William J.D. Somerville III
Administrative Law Judge

CLAIM	* BEFORE WILLIAM SOMERVILLE,
OF PETER MILLER	* AN ADMINISTRATIVE LAW JUDGE
AGAINST	* OF THE MARYLAND OFFICE
THE MARYLAND REAL	* OF ADMINISTRATIVE HEARINGS
ESTATE COMMISSION GUARANTY	* OAH No.: DLR-REC-22-11-08411
FUND	* REC No.: 09-RE-112
* * * * *	* * * * *

FILE EXHIBITS

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

1. Notice of Hearing
2. Order for Hearing, 1-28-11
3. REC licensing data for Respondent, 5-12-11
4. Claimant’s claim form, 9-3-08

The Claimant offered the following exhibits that were admitted:

1. Advertisement
2. Note, 5-11-07
3. Listing contract documents, 5-21-07
4. Purchase agreement document, 5-12-07
5. E-mail correspondence, 8-6-07
6. HUD statement, dated 10-8-08
7. DLLR note, 5-10-10
8. String of e-mail messages, 8-25-07

9. String of e-mail messages, 12-3-07
10. Expense breakdown document
11. SunTrust Mortgage payoff statement, 3-12-08
12. Property tax document, 2-1-08
13. Utility bills
14. Water/sewer bills
15. Homeowner's Insurance policy bill
16. Settlement Statement, 3-27-08