

THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM	*	BEFORE MARLEEN B. MILLER,
OF ROBERTA F. WIERNIK,	*	ADMINISTRATIVE LAW JUDGE
CLAIMANT	*	OF THE MARYLAND OFFICE OF
AGAINST THE MARYLAND	*	ADMINISTRATIVE HEARINGS
REAL ESTATE COMMISSION	*	
GUARANTY FUND FOR THE	*	OAH NO: DLR-REC-22-15-07776
ALLEGED MISCONDUCT OF	*	
HOLLIS T. BROWN	*	MREC NO: 2015-RE-114 G.F.
* * * * *	*	* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated May 21, 2015, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 17th day of June, 2015,

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

6/17/2015
Date

By: **SIGNATURE ON FILE**
Marla S. Johnson, Commissioner

IN THE MATTER OF THE CLAIM OF
ROBERTA F. WIERNIK,

CLAIMANT

v.

THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND,
FOR THE ALLEGED MISCONDUCT OF
HOLLIS T. BROWN,

RESPONDENT

* BEFORE MARLEEN B. MILLER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
* OAH CASE No.: DLR-REC-22-15-07776
* MREC CASE No.: 15-RE-114
*
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PROPOSED DECISION

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

STATEMENT OF THE CASE

On September 29, 2014, Roberta F. Wiernik (the Claimant) filed with the Maryland Real Estate Commission (the Commission) a Complaint & Guaranty Fund Claim (the Claim) regarding the allegedly improper acts and omissions of a licensed real estate broker, Hollis T. Brown (the Respondent). On or about September 24, 2013, the Respondent entered into a Consent Order (the Order) with the Commission. Pursuant to that Order, the Respondent agreed to revocation of his broker's license and admitted that he had failed to account for and to remit money that came into his possession in his capacity as a property manager and pursuant to the property management agreements he had entered into with his clients.

After an investigation, the Commission issued its February 20, 2015 Order for Hearing against the Respondent, noting his admitted violation of section 17-322(b)(22) of the Maryland Annotated Code's Business Occupations and Professions Article (the Business Occupations Article). On February 24, 2015, the Commission forwarded the Order for Hearing to the Office of Administrative Hearings (OAH) to conduct a hearing and to issue a proposed decision and order in this case.

On May 15, 2015, I conducted a hearing at OAH's Administrative Law Building in Hunt Valley, Maryland, pursuant to section 17-408 of the Business Occupations Article. The Claimant represented herself. Assistant Attorney General Kris King represented the Commission's Guaranty Fund (the Fund). Pursuant to the Order,¹ the Respondent did not attend the hearing and I proceeded to hear the case in his absence.²

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2014); the Commission's procedural regulations, COMAR 09.11.03; and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

ISSUES

- Did the Claimant sustain an actual loss, compensable by the Fund, due to the Respondent committing acts or omissions involving theft, embezzlement, false pretenses, forgery, fraud, or misrepresentation?
- If so, what amount should be awarded to the Claimant from the Fund?

¹ See Proposed Finding of Fact 14, at p. 7.

² Section 17-324 of the Business Occupations Article provides that if the individual, after receiving proper notice of the hearing, fails or refuses to appear, the Commission may hear and determine the matter despite the individual's absence. See also COMAR 28.02.01.23.

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted no documents for admission into evidence.

I admitted the Fund's documents into evidence as the following numbered exhibits:

1. April 3, 2015 Notice of Hearing
2. The Commission's February 20, 2015 Order for Hearing
3. The Respondent's licensing history, certified on September 5, 2014
4. Jack L. Mull, Jr.'s Report of Investigation, undated, with the following attachments:
 - The Claimant's September 29, 2014 Complaint & Guaranty Fund Claim
 - The Respondent's September 24, 2013 response to claims against him
 - Maryland SDAT printout for 5026 Round Tower Place, with the October 28, 1999 Property Deed
 - May 20, 1983 Real Estate Management Agreement
 - August 24, 2009 letter from the Claimant to the Respondent
 - May 19, 2008 Notice of Violation
 - January 11, 2011 email from Home Worx LLC to Mona Doak
 - April 1, 2011 Residential Lease Agreement
 - The Respondent's January through December 2011 Annual Statement for the Claimant's property
 - 2011 Internal Revenue Service Form 8582
 - The Respondent's January through May 2012 Annual Statement for the Claimant's property
 - 2012 Internal Revenue Service Form 8582
 - January 2012 email correspondence between the Claimant and the Respondent

- May 22, 2012 email from Julie Cline to the Respondent
- June 23, 2012 Inspection Report
- July 2012 email correspondence between Julie Cline and the Respondent
- August 1, 2012 email from Julie Cline to the Respondent
- September 9, 2012 email from the Respondent to Julie Cline
- September 2012 email correspondence between Julie Cline and the Respondent
- September 2012 email correspondence between Julie Cline and Mona Doak
- September 19, 2012 email from William Partlow to the Claimant
- September 21, 2012 Home Inspection Report
- October 1, 2012 Champion Chimneys Invoice
- September 26, 2012 Un-Limb-ited Proposal
- November 29, 2012 Exin Solutions Proposal and work log
- June 18, 2013 ProServ Landscaping Invoice
- April 11, 2013 Exin Solutions Estimate and work log
- 2013 Exin Solutions credit card receipts, credit card statements, personal checks, and email correspondence
- The Claimant's Notes, undated
- September 16, 2014 David Vane Affidavit
- Security Deposits printout for properties managed by the Respondent, prepared August 13, 2013
- October 24, 2013 Subpoena Duces Tecum to the Columbia Bank, with the Respondent's bank records for the period from July 31 through August 31, 2013

- August 15, 2013 letter from Patrick Richardson, the Commission's Fiscal Auditor, to J. Stephen Long, the Commission's Assistant Director
- September 24, 2013 Consent Order

I admitted no exhibits on the Respondent's behalf.

Testimony

The Claimant testified on her own behalf. The Fund presented the testimony of Jack L. Mull, Jr., the Commission's investigator. Pursuant to the Order,³ the Respondent presented no testimony at the hearing.

PROPOSED FINDINGS OF FACT

I propose that the Commission find the following facts by a preponderance of the evidence:

1. At all relevant times, the Respondent was a licensed real estate broker for H. T. Brown Real Estate, Inc.
2. On or about July 26, 1972, the Claimant purchased property located at 5026 Round Tower Place in Columbia, Maryland (the Property).
3. On May 20, 1983, the Claimant entered into a Real Estate Management Agreement (the Management Agreement) with the Respondent,⁴ authorizing the Respondent to lease and to manage the Property and creating a fiduciary relationship between the Claimant and the Respondent. Among other terms, the Management Agreement provided as follows:
 - The Respondent was required to collect, hold and return security deposits to any tenants;
 - The Respondent was required to prepare and to provide to the Claimant statements of receipts, expenses and charges; and

³ See Proposed Finding of Fact 14, at p. 7.

⁴ The Claimant first employed the Respondent to manage the Property soon after its purchase.

- The Respondent was required to collect and to remit to the Claimant the monthly rent (minus a commission)⁵ received from any tenant leasing the Property.

4. On behalf of the Claimant, the Respondent entered into a March 28, 2011 Residential Lease Agreement (the Lease) with Tracy and Yokasta Aarons (the Tenants) to lease the Property. The Tenants agreed to pay \$1,700.00 in monthly rent and provided a \$1,900.00 security deposit to the Respondent.

5. The Respondent collected monthly rent from the Tenants between approximately April 1, 2011 and May 24, 2012 and was required to remit the amount of that rent (minus the Respondent's ten percent commission) to the Claimant.

6. Although the Tenants consistently paid their monthly rent, the Respondent failed to remit a total of \$4,590.00 in rental proceeds owed to the Claimant for October through December 2011⁶ and \$7,650.00 in rental proceeds owed to the Claimant for January through May 2012.⁷

7. The Respondent retained \$1,360.00 as his ten percent management fee from the Tenant's payments from October 2011 through May 2012.⁸

8. Starting in June 2012, the Tenants defaulted on their rental payments, until they vacated the Property in September 2012, leaving past due rental amounts and damage to the Property that far exceeded the amount of their security deposit.

9. The Respondent failed to maintain in a trust account the Tenants' \$1,900.00 security deposit and failed to return all or any part of it to the Tenants or to the Claimant.

⁵ Initially, the commission was 3.5 percent but increased, over the years, to ten percent.

⁶ The Respondent collected \$5,100.00 in total rental payments for these months, deducting \$510.00 as his ten percent commission.

⁷ The Respondent collected \$8,500.00 in total rental payments for these months, deducting \$850.00 as his ten percent commission.

⁸ The total of \$1,360.00 is arrived at by adding the \$510.00 in 2011 commissions to the \$850.00 in 2012 commissions retained by the Respondent.

10. The Claimant provided the Respondent with \$890.00 to repair a damaged ceiling in the living room, to paint the shutters, and to shore up the Property's foundation. The Respondent never made these repairs but, nevertheless, failed to return the \$890.00 to the Claimant.

11. On September 9, 2012, the Claimant terminated the Management Agreement.

12. At some point prior to the Respondent's termination as property manager, he installed a new water heater in the basement of the Property.

13. On September 9, 2013, the Commission suspended the Respondent's real estate broker's license. To resolve the Commission's further intended regulatory action against the Respondent for his misappropriation of funds from numerous clients, including the Claimant, on September 24, 2013, the Respondent entered into a Consent Order with the Commission. In that Order, the Respondent agreed, among other things, that he had failed to account for or to remit funds owed to his clients, in violation of section 17-322(b)(22) of the Business Occupations Article, and that he would not participate in any hearing against the Fund arising out of his actions as a property manager with H. T. Brown Real Estate, Inc.

14. The Commission revoked the Respondent's real estate broker's license on September 25, 2013.

15. On September 29, 2014, the Claimant filed her Claim against the Fund for reimbursement of the funds improperly retained by the Respondent.

16. On October 1, 2014, the Commission assigned its investigator, Jack L. Mull, Jr., to investigate the Claim. That investigation included interviews of the Claimant and the Respondent's former staff and a review of the records maintained by the Claimant and the Respondent.

DISCUSSION

The Respondent consented to revocation of his broker's license for violating section 17-322(b)(22) of the Business Occupations Article, which provides as follows:

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

....

(b) Grounds. -- 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:

....

(22) fails to account for or to remit promptly any money that comes into the possession of the licensee but belongs to another person. . . .

Claims for reimbursement from the Fund are governed by section 17-404 of the Business Occupations Article, which states, in pertinent part, as follows:

§ 17-404. Claims against the Guaranty Fund.

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

(2) A claim shall:

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

1. a licensed real estate broker;

....

(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.

....

(d) Limitations period. -- A claim under this subtitle shall be submitted to the Commission within 3 years after the claimant discovers or, by the exercise of ordinary diligence, should have discovered the loss or damage.

With respect to claims against the Fund, COMAR 09.11.03.04 further provides as follows:

.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 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.

The Claimant bears the burden of proving her entitlement to recover from the Fund.

Business Occupations Article § 17-407(e). It is undisputed that, at all relevant times, the Respondent was a licensed real estate broker and his transactions with the Claimant related to Maryland real estate, fulfilling the requirements of sections 17-404(a)(2)(i) and (ii) of the Business Occupations Article. To prove entitlement to recovery from the Fund, the Claimant was therefore only required to prove that she incurred an actual loss based on the Respondent's acts or omissions, in which the Respondent obtained money or property by theft, embezzlement, false pretenses, or forgery, or by conduct that constituted fraud or misrepresentation.

Based on the evidence presented, I find that the Respondent embezzled the Claimant's funds.⁹ Embezzlement occurs whenever money or other property is entrusted to someone who stands in a fiduciary relationship with the owner and the fiduciary fraudulently and willfully appropriates the property to a use other than that which was intended. *State v. Burroughs*, 333

⁹ Additionally, section 17-502(b) of the Business Occupations Article provides that "a real estate broker may not use trust money for any purpose other than that for which it is entrusted to the real estate broker." See also section 17-505(a)(1) of the Business Occupations Article.

Md. 614 (1994); *see generally* 9 M.L.E. *Embezzlement* §§ 2 & 3, pp. 251-52 (2008) (“The offense of embezzlement is complete whenever a person who has been entrusted with money or property forms an intent to convert it to his or her own use, and has possession with such intent.”) § 2, at 251.

Section 7-113(a) of the Maryland Annotated Code’s Criminal Law Article further defines embezzlement as follows:

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

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

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

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

Based on the foregoing authority, for the Claimant to establish embezzlement by the Respondent, the Claimant was required to prove, and did prove, that, while serving in a fiduciary capacity, the Respondent lawfully obtained funds from the Tenants on the Claimant’s behalf, and, that while serving in a fiduciary capacity, he misappropriated all or part of those funds with fraudulent intent. The Claimant was also required to prove, and did prove, that, while serving in a fiduciary capacity, the Respondent lawfully obtained funds from the Claimant for repairs to her Property, and that while serving in a fiduciary capacity, he misappropriated all or part of those funds with fraudulent intent.

For the following reasons, I conclude that the Claimant has successfully proven that she incurred an actual loss based on the Respondent’s acts or omissions, in which he obtained money or property by embezzlement of funds belonging to the Claimant. As the Claimant’s agent providing property management services, the Respondent owed a fiduciary obligation to the

Claimant,¹⁰ which he admittedly violated when he failed to account for or to tender the funds he was required to manage under the Management Agreement. Also, as the Claimant's agent providing property management services, the Respondent owed a fiduciary obligation to the Claimant, which he admittedly violated when he failed to use funds advanced to him by the Claimant for the purpose for which those funds were intended, i.e., for repairs/maintenance of the Property.

The only remaining question is the amount that the Claimant has proven that she is entitled to recover from the Fund as a result of the Respondent's embezzlement. COMAR 09.11.01.18 limits such recovery to the "actual monetary loss" incurred by a claimant.

The Claimant requested reimbursement for missing rental payments from January 2002 through August 2012. Section 17-404(d) of the Business Occupations Article expressly imposes a three-year statute of limitations for claims against the Fund. Since the Claimant filed her Claim against the Fund on September 29, 2014, I only considered potential losses from October 1, 2011 forward.

Mr. Mull determined from the records of the Respondent's former company, as explained to Mr. Mull by the Respondent's former associates and as verified by the Claimant's records and the Respondent's bank records, that the Respondent failed to remit to the Claimant \$12,240.00 in rental proceeds owed under the Management Agreement from October 2011 through May 2012. I am persuaded that the Claimant should be awarded this amount.

At the hearing, the Claimant asserted and the Fund's representative agreed that, as a matter of public policy, the Respondent should not be credited his ten percent management fee for the months when he not only failed to fulfill his duties under the Management Agreement but

¹⁰ "In accepting employment as an agent, the licensee shall protect and promote the interests of the client. This *obligation of absolute fidelity to the client's interest is primary*, but it does not relieve the licensee from the statutory obligations towards the other parties to the transaction." COMAR 09.11.02.02A (emphasis added).

embezzled funds placed in trust with him pursuant to that agreement. I concur.¹¹ Mr. Mull calculated that the Respondent withheld \$1,360.00 as his management fee for the months in question. I am persuaded that the Claimant should be awarded this amount.

The Claimant contends that she is also entitled to recover from the Fund the amount of the Tenants' security deposit, \$1,900.00. The Tenants owed rent for June through September 2012 and that past due rent, plus the amount that the Claimant was required to expend to repair the Property after the Tenants vacated far exceeds the amount of the security deposit. *See* Md. Code Ann., Real Prop. § 8-203(f) (Supp. 2014). Accordingly, I agree with the Fund's representative that the Claimant should also be awarded \$1,900.00 for the embezzled security deposit.¹²

The Claimant further contends that she advanced \$17,780.00 to the Respondent to make repairs to the Property but that these repairs were never completed and the Respondent failed to return the advanced monies. In his investigation, Mr. Mull could only find evidence that the Claimant provided the Respondent with \$890.00 to repair a damaged ceiling in the living room, to paint the shutters, and to shore up the foundation. The Claimant convincingly testified that the Respondent collected the \$890.00 for these repairs; nevertheless, these repairs were never made. The Fund asserted that the Claimant should recover no more than \$890.00 since she was unable to substantiate the remaining amounts claimed for repairs not completed. Because the Claimant bears the burden of proof and failed to provide evidence of any other amounts advanced for unperformed repairs, I agree with the Fund.

The Claimant also requested reimbursement for excessive damage to the Property under the Respondent's management. She argued that the Property sustained \$81,403.00 in damage

¹¹ I allowed the Claimant to amend the Claim so she could seek reimbursement for the funds the Respondent withheld as his ten percent commission.

¹² I am unable to award interest on this security deposit because I was not provided with any evidence regarding the amount of any accrued interest.

due to the Respondent's mismanagement and that she had to expend a great deal of money to reverse the damage. The Fund asserted that this sum is not recoverable because it is not an actual monetary loss sustained by the Claimant based on the Respondent's acts or omissions.¹³

While the Respondent's mismanagement may have caused damage to the Property, reimbursement for such damage is not recoverable because such a loss did not arise from the Respondent's theft, embezzlement, false pretenses, forgery, fraud, or misrepresentation. See COMAR 09.11.03.04B(1).

Finally, the Claimant requested \$800.00 as reimbursement for a basement water heater installed by the Respondent that was described to her as new but that she believes was used when it was installed. The Claimant testified that she was told by another contractor who inspected the Property that the basement water heater was used. On the other hand, the Fund noted that the Claimant failed to personally verify that the basement water heater was not as described by the Respondent and, further, pointed to the report of a subsequent property inspector, from Vane Property Inspections, who on September 21, 2012 described the approximate age of the basement water heater as "new." (Fund Ex. 4, attachment 22, page 30 of 64). Thus, I agree with the Fund that the Respondent should not be awarded the \$800.00 claimed.

Consequently, I find that the Claimant provided proof of an actual loss, calculated as follows:

Past due rental proceeds	\$ 12,240.00
The Respondent's ten percent management fee	1,360.00
Security deposit	1,900.00
Monies advanced for uncompleted repairs	+ 890.00
THE CLAIMANT'S ACTUAL MONETARY LOSS	\$ 16,390.00

¹³ This sum is also far in excess of the \$50,000.00 cap placed on claims against the Fund by section 14-404(b) of the Business Occupations Article.

CONCLUSIONS OF LAW

Based upon the foregoing Proposed Findings of Fact and Discussion, I conclude as a matter of law as follows:

- The Claimant has suffered an actual loss compensable by the Fund due to the Respondent committing acts or omissions involving embezzlement; and
- The Fund should pay the Claimant her actual monetary loss, in the amount of \$16,390.00 for the Respondent's wrongful acts and omissions.

Business Occupations Article §§ 17-322(b)(22) & 404(a)(2).

PROPOSED ORDER

I PROPOSE that the Maryland Real Estate Commission **ORDER** as follows:

1. The Maryland Real Estate Commission Guaranty Fund shall pay to the Claimant, Roberta F. Wiernik, her actual monetary loss, in the amount of \$16,390.00, for the Respondent's wrongful acts and omissions.
2. The Commission's records and publications shall reflect this proposed decision.

May 21, 2015
Date Decision Issued

MBM/cj
#156225

SIGNATURE ON FILE

Marleen B. Miller
Administrative Law Judge