

THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM \* BEFORE NANCY E. PAIGE,  
 OF PAUL RUSSO, \* 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-22-13-29178  
 ALLEGED MISCONDUCT OF \*  
 SUE ANN WILLISON \* MREC NO: 2013-RE-139 G.F.

\* \* \* \* \*

**PROPOSED ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated December 27, 2013, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 19th day of February, 2014,

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**

2/19/14  
 Date

By: Marla S. Johnson, Commissioner

IN THE MATTER OF THE CLAIM OF	* BEFORE NANCY E. PAIGE,
PAUL RUSSO,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND REAL	* OF ADMINISTRATIVE HEARINGS
ESTATE GUARANTY FUND,	* OAH No. DLR-REC-22-13-29178
FOR THE ALLEGED MISCONDUCT	* REC No. 13-RE-139GF
OF SUE ANN WILLISON	*

\* \* \* \* \*

**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 November 15, 2012, Paul Russo (Claimant) filed a claim with the Maryland Real Estate Guaranty Fund (Fund), established by the Maryland Real Estate Commission (REC), for reimbursement of actual losses in the amount of \$21,500.00, allegedly suffered as a result of the misconduct of Sue Ann Willison (Respondent), a licensed real estate salesperson at relevant times.<sup>1</sup> On July 25, 2013, the REC transmitted the case to the Office of Administrative Hearings (OAH) for a contested case hearing.

On November 7, 2013, I conducted a hearing at the Largo Government Center in Largo, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-407(c)(2)(ii) (2010). The Claimant was

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<sup>1</sup> The REC revoked the Respondent's license on November 22, 2011.

present and represented himself. Hope Sachs, Assistant Attorney General, represented the Fund. The Respondent failed to appear at the hearing.

The contested case provisions of the Administrative Procedure Act, the procedures for Administrative Hearings of the Department of Labor, Licensing and Regulation (DLLR), and the Rules of Procedure of the OAH govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); Code of Maryland Regulations (COMAR) 09.01.03; 09.11.03; and 28.02.01.

### **ISSUES**

1. Did the Claimant sustain an actual loss compensable by the Fund?
2. If so, what is the amount of that loss?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following documents into evidence on behalf of the Claimant:

Cl. #1. July 28, 2010 Property Management and Exclusive Rental Agreement between Claimant and West Patrick Property Solutions, LLC

Cl. #2. September 1, 2010 Residential Dwelling Lease for Maryland

Cl. #3. March 1, 2011 Residential Dwelling Lease for Maryland

Cl. #4. May 15, 2011 Synergy Management Services, LLC, Property Management and Exclusive Rental Agreement

Cl. #5. June 1, 2011-September 23, 2011 monthly "Income and Expense Detail" reports

Cl. #6. May 30, 2011 Agreement of Release of Escrow Deposit and Residential Dwelling Lease with attachments

Cl. #7. March 29, 2011 email from Respondent to Claimant with attachments

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

GF #1. September 24, 2013 memorandum from Sandra L. Sykes to Legal Services with attachments

GF #2. September 24, 2013 memorandum from Sandra L. Sykes to Legal Services with attachments

GF #3. October 10, 2013 Notice of Hearing

GF #4. Respondent's Licensing History printed October 8, 2013

GF #5. November 15, 2012 Complaint and Guaranty Fund Claim

As the Respondent was not present, she offered no exhibits.

### Testimony

The Claimant testified on his own behalf. The Fund did not offer any testimony.

### FINDINGS OF FACT

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

1. At all times relevant to this matter, the Respondent was a licensed real estate salesperson.
2. The Respondent's license was terminated on June 28, 2011, and revoked on November 22, 2011.
3. On or about July 28, 2010, the Claimant and Respondent, in her capacity as agent of West Patrick Property Solutions, a Frederick, Maryland-based company she had created, entered into a Property Management and Exclusive Rental Agreement (the Management Agreement). The Management Agreement directed the Respondent to rent, lease, operate and manage the Claimant's investment property located at 261 South Prospect Avenue in Hagerstown, Maryland (the Property).<sup>2</sup>

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<sup>2</sup> The Management Agreement also covered other properties not in issue here.

4. On or about September 1, 2010, the Respondent, as Claimant's agent, entered into a one year Residential Dwelling Lease, ending September 2011 (Lease #1), with a tenant (Tenant #1) for Apartment 3 at the Property. Pursuant to Lease #1, Tenant #1 paid \$500.00 per month rent. Tenant #1 also paid a security deposit of \$500.00.
5. On or about March 1, 2011, the Respondent, as Claimant's agent, entered into a month-to-month Residential Dwelling Lease, ending February 28, 2012 (Lease #2), with another tenant (Tenant #2) for Apartment 1 at the Property. Pursuant to Lease #2, Tenant #2 paid \$500.00 per month rent and posted a security deposit of \$500.00.
6. Pursuant to the Management Agreement, the Respondent was entitled to a leasing fee of 8% of the Tenant's first full month's rent and 25% of the first full month's rent on any extension or renewal of any existing lease for each year the lease is renewed. In addition, the Respondent was entitled to compensation for management services at the rate of 8% of the total gross rents collected in one month.
7. The Respondent failed to remit to the Claimant his share of the Tenants' rent for the months of April and May 2011.
8. Tenants ##1 and 2 continue to occupy Apartments 3 and 1, respectively, and have paid rent continuously since entering into their respective leases.
9. Prior to January or February 2011, the basement apartment at the Property was also occupied by a tenant. After the tenant vacated the apartment, the Claimant and the Respondent inspected the apartment and the Claimant agreed to authorize repairs, including cleaning, repair of a small leak, drywall repairs, painting and replacement of the kitchen floor.
10. On March 29, 2011, the Respondent advised the Claimant that the cost of repairs was \$1,293.80, and that she was seeking a new tenant.

11. The Respondent deducted the cost of repairs to the basement apartment from rents she had collected from various of the Claimant's tenants, but did not perform any repairs.
12. On or about May 15, 2011, the Claimant hired a new management agent.
13. Between the time the Claimant inspected the basement apartment and May 2011, when the new management agent began managing the property, the basement apartment deteriorated significantly as a result of water damage and other damage (including removal of plumbing fixtures). It was (and is) no longer habitable.
14. On or about June 18, 2011, the parties entered into two documents entitled, "Agreement of Release of Escrow Deposit and Residential Dwelling Lease," for release of the security deposits paid by Tenants ##1 and 2, respectively, and for disbursement of those deposits to the successor management agent. The Respondent failed to disburse the deposits, totaling \$1,000.00.

### **DISCUSSION**

A person may recover compensation from the 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 or licensed real estate salesperson that involves a transaction related to real estate located in the State. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(i), (ii) (2010). For misconduct to be compensable, the act or omission must constitute either theft, embezzlement, false pretenses, forgery, fraud or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(2)(iii), 17-402(c) (2010); COMAR 09.11.03.04. At a hearing concerning a claim against the Fund, the burden of proof shall be on the claimant to establish the validity of the claim. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2010). The REC shall order payment of a claim by the Fund for the actual monetary loss, up to \$50,000.00, suffered by the claimant. Md. Code Ann., Bus. Occ. & Prof. § 17-410(a), (b) (Supp. 2013).

Two categories of acts or omissions may give rise to an actual loss. In the first, money or property is obtained by a licensee by theft, embezzlement, false pretenses or forgery. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(iii)(1). The second category involves a licensee's act or omission that constitutes fraud or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(iii)(2); COMAR 09.11.03.04B(1).

The statute includes the following relevant definitions at section 17-101 of the Business Occupations and Professions Article:

(a) *In general.*- In this title the following words have the meanings indicated.

...

(j) *Licensed real estate salesperson.*- "Licensed real estate salesperson" means, unless the context requires otherwise, a real estate salesperson who is licensed by the Commission to provide real estate brokerage services on behalf of a licensed real estate broker with whom the real estate salesperson is affiliated.

...

(l) *Provide real estate brokerage services.*- "Provide real estate brokerage services" means to engage in any of the following activities:

(1) for consideration, providing any of the following services for another person:

- (i) selling, buying, exchanging, or leasing any real estate; or
- (ii) collecting rent for the use of any real estate;

...

(m) *Real estate.*-

(1) "Real estate" means any interest in real property that is located in this State or elsewhere.

Md. Code Ann., Bus. Occ. & Prof. § 17-101 (2010).

COMAR 09.11.03.04 addresses claims against the guaranty fund as follows:

A. A guaranty fund claim shall be based on the alleged misconduct of a licensee.

B. For the purpose of a guaranty fund claim, misconduct:

(1) Is an action arising out of a real estate transaction involving real estate located in this State which causes actual loss by reason of theft or embezzlement of money or property, or money or property unlawfully obtained from a person by false pretense, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit;

(2) Is performed by an unlicensed employee of a licensed real estate broker or by a duly licensed real estate broker, associate broker, or salesperson; and

(3) Involves conduct for which a license is required by Business Occupations and Professions Article, Title 17, Annotated Code of Maryland.

The essential facts in this proceeding are not in dispute. The Claimant executed a property management and leasing agreement with the Respondent to lease and manage the Claimant's Property. The Respondent secured tenants for two apartments in the Claimant's Property and entered lease agreements with the tenants as the Claimant's agent. Pursuant to those leases, she collected rent and security deposits. These undertakings constituted the performance of real estate brokerage services. Md. Code Ann., Bus. Occ. & Prof. § 17-101(l).

There is no dispute that the Respondent was licensed by the REC at relevant times and that the transactions in question involved real estate brokerage services. Md. Code Ann., Bus. Occ. & Prof. § 17-101(l). The Respondent's failure to remit rents and to transfer security deposits to the new management agent amounted to theft of the Claimant's money, and he is therefore entitled to compensation from the Fund for his actual loss in that regard. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(2), 17-402(c); COMAR 09.11.03.04.

The evidence established that in the months of April and May 2011, the Respondent collected \$500.00 per month in rent payments from each of the Tenants, but failed to remit any portion to the Claimant in each of those months, as required by the Management Agreement. The evidence also establishes that the Respondent collected a security deposit from each of the Tenants of \$500.00. The Tenants continue to occupy the apartments, so the Claimant is required to maintain the security deposits in escrow. Although she agreed to do so, the Respondent has not transferred the security deposits to the new management agent.

The Claimant seeks reimbursement of the full rental amounts, without deduction of the management fees provided for in the Management Agreement. In view of her theft of the



Claimant's funds, and her failure to maintain the Property, as discussed below, it is reasonable to conclude that the Respondent had not earned the management fee. The rents were the property of the Claimant. The Respondent did not appear at the hearing and there is thus no evidence to rebut the inference that she had not earned that fee, and was therefore not entitled to any deduction from the rents collected. Accordingly, I conclude that the Claimant is entitled to reimbursement from the Fund in the amount of \$2,000.00 for theft of rents collected by the Respondent, plus \$1,000.00 for theft of the security deposits paid by the two tenants.

The Claimant also seeks reimbursement for \$1,293.80 that he authorized the Respondent to spend for repairs to the basement apartment at the Property. He claims that the Respondent deducted this amount from rents she had collected from this and other properties covered by the Management Agreement, but failed to make the necessary repairs. He also seeks compensation for substantial additional damage to the basement apartment which he claims resulted from the failure of the Respondent to make the repairs, and for lost rent because the apartment became non-habitable.

The Claimant was unable to document the fact that the Respondent had deducted \$1,293.80 from amounts she owed him, but was quite certain that she had. He claimed that her record-keeping and accounting were extremely poor, and that he was unable to piece together evidence to substantiate this contention. The Fund did not contest the claim for this amount. Based upon the condition of the apartment in May 2012, I accept the Claimant's testimony that the Respondent did not make the repairs in issue. It is also clear that the Respondent was not honest in her dealings with the Claimant, and she was not present to offer rebuttal evidence. I therefore accept the Claimant's contention that the Respondent obtained the money for repairs by misrepresentation and that the repairs were not performed. I conclude that the Claimant is entitled to recover \$1,293.80 for this claim.

The Claimant also seeks to recover \$9,500.00 for the cost to restore the basement apartment to habitability, and an additional \$9,000.00 for lost rent (18 months at \$500.00 per month) for the period he has not been able to rent the apartment because of its deteriorated condition. Although I sympathize with the Claimant's losses as a result of the Respondent's dishonesty, I am unable to recommend compensation for these amounts.

The Claimant claims that he is entitled to the cost of restoring the basement apartment to a rentable condition because he relied on the Respondent's misrepresentation that the apartment was in rentable condition by the end of March 2011, and as a result, it was permitted to continue to deteriorate over the next two months. He also claims lost rents as a result of the condition of the apartment.

The Claimant is entitled to cover actual losses he sustained as a result of the Respondent's fraud or misrepresentation. The Maryland Court of Appeals has defined fraud as follows:

To present a prima facie case of fraud, in Maryland, it must be pleaded and proved:

- (1) that a false representation was made by a party;
- (2) that its falsity was known to that party or that the misrepresentation was made with such reckless indifference to truth as to impute knowledge to the party;
- (3) that the misrepresentation was made for the purpose of defrauding some other person;
- (4) that the person not only relied on the misrepresentation but had a right to rely upon it with full belief in its truth, and that the person would not have done the thing from which the damage resulted if the misrepresentation had not been made; and
- (5) that the person suffered damage directly resulting from the misrepresentation.

*Gross v. Sussex, Inc.*, 332 Md. 247, 257 (1993) (citations omitted). The Court further noted that “[o]ne under a duty to disclose a material fact and who fails to do so, may be liable for fraud.” *Gross*, 332 Md. at 258, n.4 (citations omitted). Fraud must be proven by clear and convincing evidence. *Loyola Federal Sav. & Loan Asso. v. Trenchcraft, Inc.*, 17 Md. App. 646, 648 (1973).

Maryland also recognizes a cause of action for negligent misrepresentation, based upon proof of the following elements:

- (1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
- (2) the defendant intends that his statement will be acted upon by the plaintiff;
- (3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
- (4) the plaintiff, justifiably, takes action in reliance on the statement; and
- (5) the plaintiff suffers damage proximately caused by the defendant's misrepresentation.

*Gross*, 332 Md. at 259; *Weisman v. Connors*, 312 Md. 428, 444 (Md. 1988) (citations omitted).

The evidence is insufficient to establish either fraud or negligent misrepresentation on the part of the Respondent that caused the Claimant's losses as a result of deterioration of the basement apartment. The Claimant relies on an email that the Respondent sent him on March 29, 2011 which stated:

The repairs on your property for the basement for the supplies and the labor was \$1293.80. I am now in the process of advertising for a tenant. [Cl. #7]

This certainly implies that repairs were done, and that the apartment was in rentable condition as of March 29, 2011. While it may be inferred that the Respondent led the Claimant to believe that repairs were made in order to retain the alleged cost of those repairs, it is highly unlikely that she misled him in respect to the condition of the apartment in order to defraud him. It is much more likely that she did so in order to conceal her failure to fulfill her management

obligations. It is also not at all clear that the devastating damage that appears in the photographs of the apartment taken in May 2011, including removal of plumbing fixtures, collapsed ceiling and extensive water damage, was the result of the Claimant's reliance on that misrepresentation.

The type of deterioration visible in the May 2011 photographs likely occurred over a period of time. There is no evidence as to when it occurred. The Claimant testified that he visited the apartment in or about February 2011, that only minor repairs were necessary at that time, and that he did not discover the more serious damage until May. It could be that the apartment was damaged before the Respondent even made the misrepresentations, and while the Claimant may have been dissuaded from visiting the apartment after he received the Respondent's email at the end of March 2011, there is no way of determining whether his loss would have been significantly different if he had found out about the damage earlier.

It is also not apparent that the more extensive damage is directly related to the failure to make repairs. It is equally, if not more, likely that it was the result of vandalism or neglect unrelated to the repairs in question. The Claimant did not testify as to when or how he determined that the Respondent was not trustworthy and how much time elapsed before he found a new management agent, or what he did about the Property in the interim. The damage visible in the photographs could have occurred after the Claimant knew he could not rely on the Respondent to care for his property, in which case the resulting loss occurred, not because of his reliance on the Respondent's misrepresentations, but because he did not have a responsible management agent in place at the time the apartment was damaged.

In sum, it may be inferred that the Respondent intended the Claimant to rely on her misrepresentation that the apartment had been repaired and was rentable, and that she made the false statements so that she could retain the amount claimed for repairs and/or deter the Claimant from finding out about her failure to perform her contract obligations. The evidence is not

sufficient, however, to establish that more extensive damage to the apartment was the result of the Claimant's reliance on those misrepresentations. Therefore, the claim for repair of the apartment is not reimbursable by the Fund.

It follows that the claim for lost rent also cannot be traced to the Respondent's misrepresentations. Since the evidence does not establish how or when the major damage to the apartment occurred, there is no basis for concluding that the apartment would have been rented in May 2011, but for the Respondent's false statements. Additionally, the claim for \$500.00 per month rent for eighteen months that the basement apartment was vacant is highly speculative. The Claimant testified that he based the claim on prior rental experience. Markets change, however, and there is no basis on this record for determining how long it would have taken to rent the apartment, had repairs been timely made, or whether it could have been rented again for \$500.00 per month. The Claimant has thus not established that he is entitled to reimbursement for lost rent.

I will recommend that the Claimant be awarded \$4,293.80 from the Fund for rent and security deposits not remitted by the Respondent and moneys she received to pay for repairs that were not made.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude that the Claimant is entitled to reimbursement from the Real Estate Guaranty Fund in the amount of \$4,293.80 for actual losses resulting from the Respondent's theft. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(2)(iii)(1), 17-410(b)(1) (2010); COMAR 09.11.01.18; 09.11.03.04.

**RECOMMENDED ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, I hereby

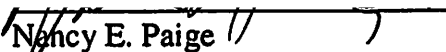
**RECOMMEND** that the Maryland Real Estate Commission:

**ORDER** that the Claimant's claim against the Maryland Real Estate Guaranty Fund be  
**ACCEPTED** in the amount of \$4,293.80; and that it further,

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

**SIGNATURE ON FILE**

December 27, 2013  
Date Decision Issued

  
Nancy E. Paige  
Administrative Law Judge

NEP/dmt  
# 146644

IN THE MATTER OF THE CLAIM OF \* BEFORE NANCY E. PAIGE,  
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**FILE EXHIBIT LIST**

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**As the Respondent was not present, she offered no exhibits.**