

THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM * BEFORE JUDITH JACOBSON,
 OF VIVIAN LOFTNESS, * 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-22-16-11750
 ALLEGED MISCONDUCT OF *
 MICHAEL BAUGHER, * MREC NO: 2016-RE-190 G.F.
 RESPONDENT
 * * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated October 28, 2016, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 21st day of December, 2016.

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

12/21/2016
Date

By: _____
Marla S. Johnson, Commissioner

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| <p>IN THE MATTER OF THE CLAIM OF</p> <p>VIVIAN LOFTNESS,</p> <p>CLAIMANT</p> <p>v.</p> <p>THE MARYLAND REAL ESTATE</p> <p>COMMISSION GUARANTY FUND,</p> <p>FOR THE ALLEGED MISCONDUCT</p> <p>OF MICHAEL BAUGHER,</p> <p>RESPONDENT</p> | <p>* BEFORE JUDITH JACOBSON,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH Case No.: DLR-REC-22-16-11750</p> <p>* MREC Case No.: 16-RE-190GF</p> <p>*</p> <p>*</p> <p>*</p> |
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PROPOSED DECISION

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STATEMENT OF THE CASE

On October 11, 2015, the Claimant filed a claim for reimbursement with the Maryland Real Estate Commission (REC) Guaranty Fund (Fund) for actual monetary losses she allegedly suffered as a result of the conduct of the Respondent, who, at all relevant times, was licensed as a real estate salesperson in the State of Maryland. The REC ordered that the Claimant should have a hearing to demonstrate her eligibility for an award from the Fund, and on April 7, 2016, the REC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

The OAH scheduled the hearing for August 23, 2016, at the OAH office in Hunt Valley, Maryland. A Notice of Hearing was sent to the parties on June 28, 2016. The Respondent's

copy of the notice was sent by first class and certified mail (return receipt requested) to his address of record with the REC. The Respondent signed the return receipt card for the certified copy of the notice on July 2, 2016.

On August 23, 2016, I convened the hearing as scheduled. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2010). The Claimant appeared and was represented by Rebekah Lusk, Esquire. The Fund was represented by Hope Sachs, Assistant Attorney General. The Respondent failed to appear. Because the Respondent received proper notice of the hearing, I ruled that the hearing would proceed in his absence. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2010).

Procedure is governed by the contested case provisions of the Administrative Procedure Act, the REC procedural regulations, and the OAH Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.11.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss, compensable by the Fund, due to an act or omission of the Respondent in which money or property was obtained from the Claimant by theft, embezzlement, false pretenses, or forgery, or an act or omission that constitutes fraud or misrepresentation in the provision of real estate sales services; and, if so,
2. What amount of award is the Claimant entitled to receive from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Claimant:

- Cl. Ex. # 1 - Property Management and Exclusive Rental Agreement, October 21, 2009, with attachments
- Cl. Ex. # 2 - Property Proposal Information Sheet, June 29, 2011; Metropolitan Regional Information Systems, Full Tax Record, September 26, 2009; Cover Sheet

- Cl. Ex. # 3 - Worksheet, "Amount Due Per Lease"
- Cl. Ex. # 4 - Detailed Property Statements, Summit Property Management, September 2011, October 2011, and December 2011
- Cl. Ex. # 5 - Detailed Property Statements, January 2012 - May 2012 and September 2012 - December 2012; Service Invoice, B&B Air Conditioning & Heating Service, February 15, 2012; Letter from B&B Air Conditioning & Heating Service to the Claimant and Respondent, March 22, 2012; Service Agreement Renewal, B&B Air Conditioning and Heating Service, undated; Invoice, Kolb Electric, October 30, 2012, with note, November 28, 2012; Check from Summit Property Management to Pedro D.R., November 20, 2012
- Cl. Ex. # 6 - Detailed Property Statements, February 2013, July 2013 - September 2013, and November 2013; Statement, Stafford Pool Service, August 1, 2013
- Cl. Ex. # 7 - Detailed Property Statements, January 2014 - July 2014; Check from V. Hartkopf to the Respondent, July 6, 2014; Statement, Stafford Pool Service, July 1, 2014; Job Invoices, Stafford Pool Service, June 4, 2014, June 11, 2014, June 17, 2014, June 23, 2014; Billing Statement, Montgomery County, June 24, 2014; Job Invoice, Silver Spring Appliance Service, February 27, 2014; Letter from the Respondent to the Claimant and Leslie Kulis, May 3, 2010; Check from the Respondent to Stafford Pool Service, July 15, 2014
- Cl. Ex. # 8 - PNC Bank statements, May 6, 2014 and June 12, 2014; Letter from PNC Bank to the Claimant, August 25, 2014
- Cl. Ex. # 9 - Check from the Respondent to Stafford Pool Service, July 15, 2014; Statement, Stafford Pool Service, August 1, 2014
- Cl. Ex. # 10 - Emails between the Claimant and the Respondent, May 2013, June 2013, February 2014, March 2014
- Cl. Ex. # 11 - Letter from the Claimant to the Respondent, June 22, 2014
- Cl. Ex. # 12 - Letter from the Respondent to the Claimant, July 15, 2014; Envelope

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. # 1 - June 28, 2016 Notice of Hearing; Order for Hearing, April 5, 2016
- Fund Ex. # 2 - Licensing Information, August 11, 2016
- Fund Ex. # 3 - Complaint and Claim, October 11, 2015

No exhibits were submitted on behalf of the Respondent.

Testimony

The Claimant testified on her own behalf. The Fund did not present any testimony. No testimony was presented on behalf of the Respondent.

FINDINGS OF FACT

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

1. At all relevant times, the Respondent was licensed by the REC as a real estate salesperson; in that capacity, he managed properties with Summit Property Management, LLC (Summit).
2. In 2009, a property on Bent Branch Road in Bethesda, Maryland (Property) was owned by members of the Claimant's family; as of 2011, the Claimant was sole owner of the Property.
3. On October 21, 2009, the Respondent and the Claimant's sister entered into a Property Management and Exclusive Rental Agreement with the Respondent and Summit. The agreement was renewed several times and remained in effect through June 2014.
4. Under the agreement, the Respondent was responsible for managing the Property when it was rented by a tenant, including collecting monthly rental payments from the tenant and making monthly disbursements to the property owner.
5. Under the Rental Agreement, the Respondent was responsible for keeping accurate records of all money received in connection with the Property, as well as all money expended in connection with the Property, and for furnishing the owner with that data on a monthly basis.
6. At all relevant times, the Property was rented to a tenant, who paid the required rent to the Respondent each month.
7. As of sometime before November 2011, the monthly rent was \$3,600.00.
8. In July 2013, the monthly rent increased to \$3,700.00.

9. The Respondent failed to forward the amount due to the Claimant in the months of November 2011, June 2012, July 2012, August 2012, January 2013, March 2013, April 2013, May 2013, June 2013, October 2013, February 2014, and March 2014.
10. The Claimant's loss from the Respondent's failure to forward the required amounts for these months was \$39,960.00.

DISCUSSION

Legal Framework

A claimant may recover compensation from the Fund for an actual loss based on an act or omission by a licensed real estate salesperson that occurs in the provision of real estate brokerage services involving a transaction that relates to real estate that is located in this State. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (Supp. 2016). A claim must be based on an act or omission in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or an act or omission that constitutes fraud or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(iii) (Supp. 2016); COMAR 09.11.03.04A and B. The amount recoverable from the Fund is restricted to the actual monetary loss incurred by the claimant. COMAR 09.11.01.18.

At a hearing on the claim, the claimant bears the burden of proving entitlement to recover from the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (Supp. 2016).

Background

At all relevant times, the Respondent was a licensed real estate salesperson. Starting in October 2009, he conducted acts of real estate brokerage as the property manager for a residence in Bethesda, Maryland, owned by members of the Claimant's family. The Respondent was responsible for collecting rent from the tenant and making monthly disbursements to the owners. In 2011, when the Claimant became the sole owner of the property, the property was rented and

it remained rented in all subsequent relevant months. The monthly rent started at \$3,600.00 and was increased in July 2013 to \$3,700.00.¹ The tenant paid the Respondent the required rent each month; the Respondent's written accounts did not indicate any past rent due.

Evidence to Support the Claimed Amount

The Claimant testified that in March 2014, she reviewed the history of payments from the Respondent and determined that the Respondent had failed to send her the money due for the months of November 2011, June 2012, July 2012, August 2012, January 2013, March 2013, April 2013, May 2013, June 2013, October 2013, February 2014, and March 2014. Based on her calculations of what the Respondent owed for those months, she claimed a loss of \$43,456.00.²

The Fund did not dispute the assertion that the Respondent had not paid the Claimant what was required for the months at issue. The Respondent did not appear at the hearing to dispute the claim. I find that the Respondent failed to send the Claimant the money due for the months of November 2011, June 2012, July 2012, August 2012, January 2013, March 2013, April 2013, May 2013, June 2013, October 2013, February 2014, and March 2014. The actions of the Respondent were theft from the Claimant, and thus reimbursable from the Fund.

At the hearing, the Fund took the position that the Claimant had established her eligibility for an award from the Fund for the stolen payments, amounting to \$43,456.00. I conclude that the Claimant did meet her burden of proof to show eligibility for an award from the Fund, but I find that the evidence does not support the Claimant's calculation of her actual loss.

¹ The Claimant testified that the rent increased in May 2013; this testimony was contradicted by her other evidence. (Cl. Ex. # 3). The Respondent's monthly account for July 2013 shows an increase for that month. (Cl. Ex. # 6).

² The Claimant originally listed the loss as \$25,000.00. (Fund Ex. # 3). At the hearing, she claimed \$43,456.00. (Cl. Ex. # 3). The Fund did not object to the Claimant's amendment of her claim.

Claim for 2011

In November 2011, the rent paid to the Respondent was \$3,600.00. The Respondent's management fee was \$288.00 (8% of \$3,600.00). The balance due to the Claimant, which was not paid, was \$3,312.00.

Claim for 2012

In June 2012, July 2012, and August 2012, the monthly rent paid to the Respondent was \$3,600.00. The Respondent's management fee was \$288.00. The balance due to the Claimant and not paid was \$3,312.00 per month, for a total of \$9,936.00 for 2012.

Claim for 2013

In January 2013, March 2013, and April 2013, the monthly rent paid to the Respondent was \$3,600.00. The Respondent's management fee was \$288.00. The balance due to the Claimant and not paid was \$3,312.00 per month, for a total of \$9,936.00 for these three months.

In May 2013, the rent paid to the Respondent was \$3,600.00. As noted above, while the Claimant testified that the rent increased in May 2013, the summary of the claim indicated that the rent increase did not start in May 2013. (Cl. Ex. # 3). The Respondent's management fee was \$288.00. The balance due to the Claimant and not paid was \$3,312.00 for May 2013.

In June 2013, I find that the rent paid to the Respondent was \$3,600.00, because the Claimant's testimony that the rent increased in May 2013 was not credible. The Respondent's management fee was \$288.00. The balance due to the Claimant and not paid was \$3,312.00 for June 2013, not \$3,404.00 as claimed.

As of July 2013, the rent increased. In October 2013, the rent paid to the Respondent was \$3,700.00. The Respondent's management fee was \$296.00. The balance due to the Claimant and not paid was \$3,404.00.

The total balance due to the Claimant and not paid was \$19,964.00 for 2013.

Claim for 2014

In February 2014, the rent paid to the Respondent was \$3,700.00. The Respondent's management fee was \$296.00. The balance due to the Claimant was \$3,404.00. The evidence contains an accounting form by the Respondent indicating that he sent \$3,404.00 to the Claimant. (Cl. Ex. # 7). The Claimant testified, however, that the Respondent's check bounced. The testimony was not challenged by the Respondent, who failed to appear at the hearing. I find that the balance due to the Claimant and not paid for February 2014 was \$3,404.00.

In March 2014, the rent paid to the Respondent was \$3,700.00. The Respondent's management fee was \$296.00. The evidence contains an accounting form by the Respondent that lists expenses for the month as \$60.00. The balance due to the Claimant was \$3,344.00. The accounting form by the Respondent indicated that he sent \$3,344.00 to the Claimant. The Claimant testified, however, that the Respondent's check bounced. The testimony was not challenged by the Respondent, who failed to appear at the hearing. I find that the balance due to the Claimant and not paid for March 2014 was \$3,344.00.

In June 2014, the rent paid to the Respondent was \$3,700.00. The Respondent's management fee was \$296.00. The accounting form for this month contains several entries about expenses that are not clearly explained, so it is unclear what balance was due to the Claimant for this month. Moreover, the Claimant's testimony about June 2014 was ambivalent: she was not sure what the Respondent owed her for that month. I find that the evidence does not establish any specific amount of loss for June 2014.

The total balance owed to the Claimant and not paid by the Respondent in 2014 was \$6,748.00, not \$10,152.00 as claimed.

Eligibility for Award

The total loss proven by the Claimant was \$39,960.00. The Claimant established her eligibility for an award from the Fund of \$39,960.00 because of the Respondent's theft of money he collected on her behalf.

CONCLUSIONS OF LAW

Based on the Findings of Facts and Discussion, I conclude as a matter of law that the Claimant sustained an actual loss, compensable by the Fund, due to an act or omission of the Respondent in which money or property was obtained from the Claimant by theft, in the provision of real estate sales services. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(iii) (Supp. 2016); COMAR 09.11.03.04A and B.

I further conclude as a matter of law that the amount of award that the Claimant is entitled to receive from the Fund is \$39,960.00. COMAR 09.11.01.18.

PROPOSED ORDER

I **PROPOSE** that the Claim filed by the Claimant against the Maryland Real Estate Guaranty Fund be **GRANTED** in the amount of \$39,960.00.

October 28, 2016
Date Decision Mailed

SIGNATURE ON FILE

Judith Jacobson
Administrative Law Judge

JJ/dlm
#164762