

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**FINAL ORDER**

MARYLAND REAL ESTATE COMMISSION \*

**FEB 10 2012**

v. \*

**MARYLAND REAL  
ESTATE COMMISSION**

JAMES L. GAY, JR  
Respondent \*

\*

\* **CASE NO. 2011-RE-228GF**

And \*

CLAIM OF GUSTAVO SAZO AND  
DORA GALICIA  
AGAINST THE MARYLAND REAL ESTATE  
COMMISSION GUARANTY FUND \*

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**OPINION AND FINAL ORDER**

This matter came before the Maryland Real Estate Commission (“Commission”), for argument on the summary suspension of the Respondent, James L. Gay, Jr.’s, Real Estate Broker’s license filed by the Commission on March 14, 2011; for a hearing on charges that the Respondent violated the provisions of Business Occupations and Professions Article (“Bus. Occ. & Prof. Art.”), *Annotated Code of Maryland*, Sections 17-322 (b) (22), (25), (31), and (33) and 17-505(c) and Code of Maryland Regulations (“COMAR”) 09.11.01.07; and for a hearing on the claim of Gustavo Sazo and Dora Galicia, against the Maryland Real Estate Commission Guaranty Fund (“Guaranty Fund”), for the alleged misconduct of the Respondent, James L. Gay, Jr.

The hearing was held by a panel of Commissioners, consisting of Commissioners Nancy R. Simpers, Anne S. Cooke, and Robin Pirtle, on September 21, 2011. Assistant Attorney General Peter Martin represented the Commission for the regulatory hearing on the summary suspension of the Respondent’s Real Estate Broker’s license and regulatory

charges against the Respondent, and Assistant Attorney General Jessica Berman Kaufman represented the Guaranty Fund for the hearing on the claim of Gustavo Sazo and Dora Galicia against the Guaranty Fund. The proceedings were electronically recorded. The Claimants, Gustavo Sazo and Dora Galicia, appeared, were placed under oath, and testified at the hearing. The Respondent also appeared for the hearing and presented argument. The Respondent and Claimants waived representation by counsel. The proceedings were electronically recorded.

### **SUMMARY OF THE EVIDENCE**

On behalf of the Commission, the following exhibits were entered into evidence at the hearing:

Commission's Exhibit 1 - April 12, 2011 letter of the Commission to the Respondent and Claimants advising them that the Commission would conduct a hearing in this matter on September 21, 2011 with attached certified mail receipts.

Commission's Exhibit 2 – March 14, 2011 letter of the Commission to the Respondent suspending Real Estate Broker's license number 01 4306.

Commission's Exhibit 3 – April 5, 2011 letter from the Respondent to the Commission requesting a hearing in this matter.

Commission's Exhibit 4 – August 3, 2011 certification by the Custodian of Records of the Commission with attached licensing records of the Commission revealing the Commission's licensing information for the Respondent.

Commission's Exhibit 5 – Department of Labor, Licensing, and Regulation licensing record print-out for the Respondent showing the Respondent's licensing history.

Commission's Exhibit 6 – Copy of a check, in the amount of \$10,000.00, dated March 31, 2011 and made payable to "Bankers Trust".

Commission's Exhibit 7 – Release of Obligation and Release of Deposit Agreement Created Under Contract of Sale dated March 30, 2010 for property located at 540 Stemmers Run Road, Baltimore, Maryland 21201.

Commission's Exhibit 8 – December 21, 2010 letter from Claimant, Gustavo Sazo, to Banker's Trust.

Commission's Exhibit 9 – Maryland Real Estate Commission Complaint and Guaranty Fund Claim signed by Claimant, Gustavo Sazo, on December 21, 2010 against "Jim Gay" and "The Bankers Trust".

Commission Exhibit 10 – March 7, 2011 letter from James L. Gay, Jr. to the Maryland Real Estate Commission.

### **FINDINGS OF FACT**

Based on the evidence and testimony presented at its hearing, the Commission finds:

1. At all times relevant to this matter, the Respondent, James L. Gay, Jr., was a licensed Real Estate Broker whose most recent license was issued to him by the Commission for the time period of November 16, 2010 through November 17, 2012.
2. The Respondent, James L. Gay, Jr., indicated that his trade name and address was Bankers Trust, 3205 Lynch Road, Baltimore, Maryland 21209 as part of information supplied to renew his license with the Commission.
3. On March 30, 2010, the Claimants, Gustavo Sazo and Dora Galicia, entered into a contract to purchase property located at 540 Stemmers Run Road, Baltimore,

Maryland 21221 (the “Property”) from Michelle Williams. The Claimants intended to reside in the Property.

4. James L. Gay, Jr. represented the Seller, Michelle Williams, in the transaction and requested the Claimants to provide him with a check in the amount of \$10,000.00, made payable to Bankers Trust, as a deposit on the property.

5. The Claimants own DLG Painting, a small painting company.

6. On March 31, 2010, the Claimants issued a check in the amount of \$10,000.00, drawn on their business account, to Bankers Trust as an earnest money deposit on the Property and submitted the check to the Respondent.

7. The Claimants were never provided with a copy of the Contract of Sale for the Property by the Respondent.

8. The Contract of Sale on the Property was cancelled by the Seller and the Claimants on September 10, 2010.

9. On November 19, 2010, after numerous, unsuccessful attempts by the Claimants to obtain the return of their deposit on the Property, they were provided with a Release of Obligation and Release of Deposit Agreement Created Under Contract of Sale form (“Release”) by the Respondent and the Claimants executed the Release on that date. The Release specified that the entire earnest money deposit of \$10,000.00 be returned to the Claimants.

10. On November 24, 2010, the Seller of the Property, Michelle Williams, executed the Release.

11. On December 21, 2010, Gustavo Sazo, Claimant, sent a letter to the Respondent at “Banker’s Trust” requesting the return of the \$10,000.00 deposit.

12. The Respondent has not returned the \$10,000.00 deposit to the Claimants.

13. On March 3, 2011, Patrick Richardson, acting in his capacity as auditor for the Commission, contacted the Respondent to schedule an audit of his business escrow account. During his attempt to schedule the audit, Mr. Richardson was informed by the Respondent that there was no money in his business escrow account and that he had used the money to pay for medical expenses incurred for medical care rendered to the Respondent's wife.

14. On March 7, 2011, the Respondent addressed a letter to the Commission in response to the complaint of the Claimants. In his letter, the Respondent stated:

“In response to complaint #228-2011 filed by Gustavo Sazo and Dora Galicia my position is quite simple. I am guilty of mishandling an escrow deposit....Personal medical and economic hardships overwhelmed me and I committed an act that I knew was wrong....”.

15. The Respondent stated at the hearing before the Commission that he has been licensed since 1974 without any other complaints against him as a licensee of the Commission. He stated that he used the \$10,000.00 for medical expenses incurred by his wife of 40 years and that he intends to repay the \$10,000.00 to the Claimants.

### **DISCUSSION**

The Commission concludes that the following provisions of the Bus. Occ. & Prof. Art. and COMAR are applicable to this case.

Bus. Occ. & Prof. Art., Section 17-328(a) provides, in pertinent part:

#### **§17-328.**

(a) Subject to the provisions of subsection (b) of this section, the Commission may order summarily the suspension of the license of a licensee if the licensee:

(1) fails to account promptly for any money held in trust;

. . .

Bus. Occ. & Prof. Art., Section 17-322, provides, in pertinent part:

**§17-322.**

(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:

. . .

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

. . . .

(25) engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings;

. . .

(31) violates any provision of Subtitle 5 of this title that relates to trust money;

. . .

(33) violates any regulation adopted under this title or any provision of the code of ethics; or

. . .

(c) (1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding \$5,000.00 for each violation.

Bus. Occ. & Prof. Art., Section 17-505(c) provides:

**§17-505.**

(c) When the duty of the real estate broker to maintain trust money in an account terminates, the real estate broker promptly shall account for all trust money.

COMAR 09.11.01.07 provides:

Licensees shall maintain adequate records of all real estate transactions engaged in by them as licensed real estate brokers or salesmen. If a licensee has custody or possession of money belonging to others, in the absence of proper written instructions from the parties involved in the transaction to the contrary, these funds may not be intermingled with funds belonging to the licensee, but rather they shall be deposited and retained as required in a non-interest-bearing account clearly designated as containing funds held for others. The records of transactions, including bank accounts or deposits referred to in these regulations, shall be available during usual business hours for inspection by the Commission, its field representatives, or other employees.

Based on testimony and evidence presented at its hearing, the Commission concludes that the Respondent violated Bus. Occ. & Prof. Art., Sections 17-322 (b) (22), (25), (31), and (33) and 17-505(c) as well as the provisions of COMAR 09.11.01.07.

The Respondent was entrusted with a \$10,000.00 earnest money deposit on the Property by the Claimants which the Respondent was required to maintain in an escrow account. The Respondent failed to deposit the \$10,000.00 earnest money deposit in an escrow account in violation of COMAR 09.11.01.07 and Bus. Occ. & Prof. Art., Section 17-322 (b) (33). Upon the cancellation of the Contract of Sale and the execution of the Release of Obligation and Release of Deposit Agreement by all parties, the Respondent was required to account for and return the \$10,000.00 earnest money deposit to the Claimants but failed to do so in violation of Bus. Occ. & Prof. Art., Sections 17-505(c) and 17-322 (b) (22) and (31). The Respondent acknowledged that he failed to deposit the \$10,000.00 earnest money deposit into his escrow account and, instead, used the funds to pay his wife's medical expenses. Despite repeated requests by the Claimants, the Respondent has failed to return their deposit to them. The Respondent's actions in regard to his handling of the earnest money deposit entrusted to him by the Claimants, his conversion of those funds to his own use, and his failure to restore those funds to the

Claimants, are clear evidence of his violation of Bus. Occ. & Prof. Art., Section 17-322(b) (25).

To determine the penalty which should be imposed for the Respondent's violations of Bus. Occ. & Prof. Art., Sections 17-322 (b) (22), (25), (31), and (33) and 17-505(c) as well as COMAR 09.11.01.07, the Commission is required by Bus. Occ. & Prof. Art., Section 17-322(c) 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 were serious. The Respondent failed to comply with requirements of the law regarding the handling of a large sum of money held in trust for the benefit of others. The Respondent's failure to handle the trust funds in accordance with the provisions of the law caused harm to the reputation of the real estate industry and violated the trust which the public accords to real estate licensees who handle their funds. Further, the Respondent's conversion of the funds to his own use while it was under his control has continued to harm the Claimants by depriving them of the use of their funds. The Respondent's actions also disclose a lack of good faith in dealing, as a licensed real estate broker, with the public. The Commission notes that, according to a print-out of its licensing records, Mr. Gay has been licensed by the Commission since at least 1983 and has been licensed as a real estate broker by the Commission since 1998. (Mr. Gay testified that he has had a real estate license since 1974 but this was not confirmed by the Commission's licensing records submitted at the hearing.) Since 1983,

there is no record of any other violations of Bus. Occ. & Prof. Art., Title 17, by the Respondent. The Commission also notes Mr. Gay's ready admission of his violations of the law and his apparent remorse for his actions.

By letter dated March 4, 2011, the Commission advised the Respondent that his real estate broker's license had been summarily suspended. In support of its decision to summarily suspend the Respondent's license, the Commission noted the Respondent's admission to an auditor for the Commission that he had no money in his escrow account, having used money which was to have been placed in his escrow account to pay for medical expenses incurred by his wife. The Commission also noted that the Claimants had informed the Commission that, despite repeated requests to the Respondent to release their earnest money deposit as required by a Release of Obligation and Release of Deposit Agreement fully executed on November 24, 2010, the Respondent had failed to do so. The Commission advised the Respondent that "...because of your failure to promptly account for the Complainants' trust money, the summary suspension is necessary and appropriate." The Commission concludes, based on the information available to it and, in accordance with the provisions of Bus. Occ. & Prof. Art., Section 17-328(a)(1), that the summary suspension of the Respondent's real estate broker's license on March 4, 2011 was warranted at that time. However, having evaluated each of the factors listed above for determining a penalty for the Respondent's violations of Bus. Occ. & Prof. Art., Sections 17-322 (b) (22), (25), (31), and (33); 17-505 (c); and COMAR 09.11.01.07, the Commission concludes that the appropriate penalty is a civil penalty in the amount of Five Thousand Dollars (\$5,000.00). The Commission further

concludes that the summary suspension of Mr. Gay's real estate broker's license should be terminated, subject to the conditions set forth hereafter.

The Claimants have filed a claim for reimbursement from the Guaranty Fund for the \$10,000.00 earnest money deposit which has not been returned to them by the Respondent. Claims for reimbursement from the fund are governed by Bus. Occ. & Prof. Art., Section 17-404, which states, in pertinent part:

**§17-404.**

(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.

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.

**COMAR 09.11.01.18** provides:

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.

The Commission finds that the claim of Gustavo Sazo and Dora Galicia against the Guaranty Fund is based on an act or omission by James L. Gay, Jr., a licensed real estate broker, that occurred in his provision of real estate brokerage services related to the purchase of real estate that is located in Maryland. Further, the Commission finds that the claim is due to the embezzlement of the Claimants' earnest money deposit, an action which was admitted by the Respondent. The Commission also finds that the Claimants' loss of their \$10,000.00 earnest money deposit was an "actual monetary loss" from the originating transaction. Therefore, the Commission concludes that the Claimants have established an actual monetary loss of Ten Thousand Dollars (\$10,000.00), due to the misconduct of the Respondent, which is compensable from the Guaranty Fund.

### **CONCLUSIONS**

Based upon the evidence and testimony presented at its hearing, the Commission concludes, as a matter of law, that:

1. The Respondent, James L. Gay, Jr., violated Bus. Occ. & Prof. Art., Sections 17-322 (b) (22), (25), (31), and (33) and 17-505 (c) and COMAR 09.11.01.07;

2. The Respondent, James L. Gay, Jr., is subject to the penalties prescribed in Bus. Occ. & Prof. Art., Section 17-322 (c) for these violations, and the imposition of a Five Thousand Dollars (\$5,000.00) civil penalty is an appropriate sanction; and

3. The Claimants, Gustavo Sazo and Dora Galicia, are entitled to payment from the Maryland Real Estate Guaranty Fund in the amount of Ten Thousand Dollars (\$10,000.00).

**ORDER**

It is this 19<sup>th</sup> day of December, 2011, by the Maryland Real Estate Commission, **ORDERED:**

1. That the Respondent, James L. Gay, Jr., violated Bus. Occ. & Prof. Art., Sections 17-322 (b) (22), (25), (31), and (33) and 17-505 (c) and COMAR 09.11.01.07;

2. That the summary suspension of the real estate broker's license of the Respondent, James L. Gay, Jr., be terminated and his real estate broker's license be reinstated subject to the conditions set forth in paragraph 5 of this ORDER;

3. That the Respondent, James L. Gay, Jr., be assessed a civil penalty in the amount of **Five Thousand Dollars (\$5,000.00)** which shall be paid within thirty (30) days of the date of this ORDER;

4. That the Claimants, Gustavo Sazo and Dora Galicia, be reimbursed in the amount of **Ten Thousand Dollars (\$10,000.00)** from the Maryland Real Estate Guaranty Fund to compensate them for the actual loss sustained by the Claimants due to the conduct of the Respondent;

5. That the Respondent, James L. Gay, Jr., shall be ineligible for the reinstatement of his real estate broker's license by the Maryland Real Estate Commission until the Maryland Real Estate Guaranty Fund is repaid in full, together with annual interest of ten percent (10%) pursuant to Bus. Occ. & Prof. Art., Sections 17-411 (a) and 17-412 and until the civil penalty is paid in full; and

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

**MARYLAND REAL ESTATE COMMISSION**

By: SIGNATURE ON FILE

**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 principal 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.