

THE MARYLAND REAL ESTATE COMMISSION

**FINAL ORDER**

IN THE MATTER OF THE CLAIM \* BEFORE EILEEN C. SWEENEY  
 OF JAMES HOUSE \* ADMINISTRATIVE LAW JUDGE NOV 26 2012  
 AGAINST THE MARYLAND REAL \* OF THE MARYLAND OFFICE OF MARYLAND REAL  
 ESTATE COMMISSION GUARANTY \* ESTATE COMMISSION  
 ADMINISTRATIVE HEARINGS  
 FUND FOR THE ALLEGED \* OAH No: DLR-REC-22-12-08218  
 MISCONDUCT OF HAKEEM \* REC CASE NO: 2011-RE-296  
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\* \* \* \* \*

**PROPOSED ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated August 13, 2012, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 27<sup>th</sup> day of September, 2012,

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**

9/26/12  
Date

By: \_\_\_\_\_  
Anne S. Cooke, Commissioner

7. The Respondent used the application fee to conduct two credit checks on the Claimant.

8. The Respondent never presented a lease to the Claimant for the Property.

9. On or about October 16, 2010, the Claimant was informed that the house next door to the Property was being used as transitional housing for ex-convicts.<sup>4</sup>

10. The Claimant called the Respondent on October 16 and 18, 2010 to request his money back because he has grandsons who visit him and he was concerned about the proximity of the alleged transitional housing.<sup>5</sup>

11. The Respondent initially agreed to refund the security deposit to the Claimant in two or three days.<sup>6</sup>

12. When the Claimant did not receive his money back within three days, he called the Respondent numerous times, reaching him twice. On the second call, the Respondent became irate, and refused to refund the security deposit, stating that he was not obligated to tell the Claimant about nearby transitional housing. He told the Claimant to take him to court.

13. The Respondent subsequently failed to return the Claimant's numerous telephone calls.

14. On or about February 4, 2011, the Claimant filed suit against in the District Court of Maryland for Baltimore City against the Respondent for return of the security deposit. He subsequently obtained a judgment in the amount of \$2,392.00,<sup>7</sup> which the Respondent never paid.

15. The Claimant sustained an actual loss in the amount of \$1,200.00 (the amount of the security deposit) as a result of the Respondent's acts and omissions.

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<sup>4</sup> As discussed below, the Claimant did not make clear who provided him with this information.

<sup>5</sup> I note that although the Claimant testified that he called the Respondent on October 17, 2010, his claim filed with the REC indicates that he called on October 16 and 18, 2010.

<sup>6</sup> The evidence did not indicate that the parties discussed the application fee.

<sup>7</sup> Other than to vaguely indicate that this amount included "fines, interest, etc.," the Claimant did not provide details as to what that amount represented other than the security deposit. (CL #3.)

## DISCUSSION

### Legal Standard

Claims for reimbursement from the Fund are governed by section 17-404 of the Maryland Business Occupations and Professions Article of the Annotated Code of Maryland and COMAR 09.11.03.04.

Section 17-404 provides in pertinent part as follows:

#### **§ 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:

\* \* \*

3. a licensed real estate salesperson;

\* \* \*

(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).

COMAR 09.11.03.04 provides in pertinent part 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 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 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).

The burden of proof rests with the Claimant to establish the validity of the claim. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2010).

In this case, the Claimant alleged that he is entitled to recover from the Fund because he sustained an actual loss when the Respondent unlawfully retained his application fee and security deposit for a residential rental in Baltimore City, and failed to disclose to the Claimant that ex-convicts lived in transitional housing located next to the Property.

The Respondent denied knowing that the individuals living next door to the property were residents of transitional housing. He contended that, regardless, he was not required to tell the Claimant about the existence of such transitional housing. He stated that he is willing, nonetheless, to refund the Claimant's security deposit to him.

The Fund argued that the Respondent was required by section 8-203.1 of the Real Property Article of the Annotated Code of Maryland to provide the Claimant with a certain type of receipt when he obtained a security deposit from him, enumerating tenant's rights, but failed to do so.<sup>8</sup> The Fund asserted that the Respondent's failure constituted, at a minimum, a misrepresentation under section 17-404 of the Business Occupations and Professions Article and COMAR 09.11.03.04B.

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<sup>8</sup> That section provides in pertinent part as follows:

§ 8-203.1. Security deposit receipt

(a) Contents. -- A receipt for a security deposit shall notify the tenant of the following:

- (1) The right to have the dwelling unit inspected by the landlord in the tenant's presence for the purpose of making a written list of damages that exist at the commencement of the tenancy if the tenant so requests by certified mail within 15 days of the tenant's occupancy;
- (2) The right to be present when the landlord inspects the premises at the end of the tenancy in order to determine if any damage was done to the premises if the tenant notifies the landlord by certified mail at least 15 days prior to the date of the tenant's intended move, of the tenant's intention to move, the date of moving, and the tenant's new address;
- (3) The landlord's obligation to conduct the inspection within 5 days before or after the tenant's stated date of intended moving;
- (4) The landlord's obligation to notify the tenant in writing of the date of the inspection;
- (5) The tenant's right to receive, by first-class mail, delivered to the last known address of the tenant, a written list of the charges against the security deposit claimed by the landlord and the actual costs, within 45 days after the termination of the tenancy;
- (6) The obligation of the landlord to return any unused portion of the security deposit, by first-class mail, addressed to the tenant's last known address within 45 days after the termination of the tenancy; and
- (7) A statement that failure of the landlord to comply with the security deposit law may result in the landlord being liable to the tenant for a penalty of up to 3 times the security deposit withheld, plus reasonable attorney's fees.

Md. Code Ann., Real Prop. § 8-203.1 (2010).

For the following reasons, I find that the Claimant met his burden of proving that he is entitled to receive compensation from the Fund.

**Licensing**

The Respondent did not dispute that he was a licensed real estate salesperson at the time of the alleged act(s) or omission(s) on which the Claimant based his claim. Indeed, the licensing information submitted into evidence by the MREC verified that status. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(i)3. Nor did the Respondent dispute that he was involved in a transaction with the Claimant that related to real estate that is located in the State. By his own testimony, the Respondent acknowledged that he rented or attempted to rent the Property to the Claimant. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(ii).

Thus, the remaining issues are whether the act(s) or omission(s) on which the Claimant based his claim involved money obtained from him by the Respondent by theft, embezzlement, false pretenses or forgery, and/or constituted fraud or misrepresentation. See Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(iii); COMAR 09.11.03.04F.

**Failure to Disclose Transitional Housing**

Other than his own bald assertion, the Claimant presented no evidence to prove the existence of transitional housing for ex-convicts next to the Property. In addition, Claimant presented no legal authority for his assertion that the Respondent was required to disclose the presence of such housing. The Claimant also argued that there were sex offenders included among the residents, but presented no evidence to that effect. (This was of particular concern to the Claimant because his grandchildren visit him, but I note that there was also no evidence that the Claimant advised the Respondent that anyone other than the Claimant would be living in the Property).

Accordingly, I find that the Claimant failed to establish that the Respondent engaged in fraud or misrepresentation by failing to disclose the alleged presence of transitional housing next to the Property.

**Failure to Advise Claimant of Enumerated Rights**

It is clear from the receipt provided by the Respondent to the Claimant for the security deposit that he did not notify the Claimant of his rights with regard to the withholding of the deposit, as required by section 8-203.1 of the Real Property Article. I disagree with the Fund, however, that his failure to enumerate those rights in the receipt constituted, at a minimum, a misrepresentation. The Fund did not explain the rationale on which it based that assertion and I see none. Consequently, I find that such an omission simply constituted, at most, a violation of section 8-203.1.

**Failure to Return Security Deposit**

The Claimant's and the Respondent's testimony established that the Claimant gave the Respondent \$1,200.00 on October 15, 2010 as a security deposit, but never signed a lease. In addition, the Respondent did not dispute that the Claimant requested the return of the security deposit within three days of being informed of the existence of the alleged transitional housing next door to the Property.

The Claimant further testified that the Respondent at first agreed to return the security deposit in three days, but subsequently advised the Claimant that he was keeping the deposit. The Respondent denied that he ever agreed to return the security deposit and argued that he was entitled to keep it because the landlord could have rented to someone else if she knew the Claimant was going to change his mind about renting the Property, and the Respondent would have to advertise the Property again in the newspaper. In addition, the Respondent believed that

he should be compensated from the security deposit for his time spent dealing with the Claimant regarding the rental.

For the following reasons, I find that the Respondent's refusal to return the Claimant's security deposit constituted theft, embezzlement, fraud and/or misrepresentation.

Section 8-203(f) of the Real Property Article sets forth the circumstances under which a security deposit may be withheld, *e.g.*, nonpayment of rent, damage due to breach of lease, or damage to the leased premises, common areas, major appliances, and furnishings, and sets forth the procedure that must be followed, *e.g.*, notice and advice or tenant's rights.<sup>9</sup> Implicit in that section is the requirement that an individual actually have entered into a lease for the premises. Since that did not occur here, the Respondent, as the agent for the landlord, did not have the right to retain the security deposit.<sup>10</sup> Even assuming *aguedo*, that the Claimant did enter into a lease, the Respondent clearly did not follow the necessary procedures for retaining it.

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<sup>9</sup> Subsection (f) provides:

(f) Withholding of deposit -- Generally; tenant's right to be present at inspection of premises. --

(1) (i) The security deposit, or any portion thereof, may be withheld for unpaid rent, damage due to breach of lease or for damage by the tenant or the tenant's family, agents, employees, guests or invitees in excess of ordinary wear and tear to the leased premises, common areas, major appliances, and furnishings owned by the landlord.

(ii) The tenant has the right to be present when the landlord or the landlord's agent inspects the premises in order to determine if any damage was done to the premises, if the tenant notifies the landlord by certified mail of the tenant's intention to move, the date of moving, and the tenant's new address.

(iii) The notice to be furnished by the tenant to the landlord shall be mailed at least 15 days prior to the date of moving.

(iv) Upon receipt of the notice, the landlord shall notify the tenant by certified mail of the time and date when the premises are to be inspected.

(v) The date of inspection shall occur within five days before or five days after the date of moving as designated in the tenant's notice.

(vi) The tenant shall be advised of the tenant's rights under this subsection in writing at the time of the tenant's payment of the security deposit.

(vii) Failure by the landlord to comply with this requirement forfeits the right of the landlord to withhold any part of the security deposit for damages.

Md. Code Ann., Real Prop. § 8-203(f) (2010). *See also* Md. Code Ann., Real Prop. § 8-203(a)(3) (2010).

<sup>10</sup> It is also questionable whether the Respondent could legally obtain the security deposit to begin with; however, the Claimant did not specifically make that assertion and, regardless, having found that the Respondent otherwise violated the Business and Occupations Article, it is not necessary for me to address that issue.



Thus, the legal authority establishes that the Respondent did not have the right to retain and use the Claimant's security deposit. I find that by doing so, the Respondent engaged in theft and embezzlement.

Furthermore, I found the Claimant to be more credible than the Respondent and believed his testimony that the Respondent initially represented to him that he would return his security deposit. The Claimant was sometimes confused about dates and some specifics, but otherwise presented as a generally credible witness. The Respondent, on the other hand, impressed me as being somewhat disingenuous. For example, he maintained that he was willing to pay back the Claimant's security deposit, but gave no explanation as to why, if that was the case, he had not done so prior to or at the time of the hearing. Nor did he explain why he had not paid the judgment obtained by the Claimant in the District Court for Baltimore City.

Thus, I find that the Respondent's representation to the Claimant in October 2010 that he would refund his security deposit, when he obviously had no intention of doing so, showed an intent to mislead or deceive, and constituted fraud and/or misrepresentation.

I did not find merit in the Claimant's assertion, however, that the Respondent engaged in theft or embezzlement and/or fraud or misrepresentation by refusing to return his \$45.00 application fee. The Claimant presented no evidence to contradict the Respondent's testimony that after he received the Claimant's application fee, he used the money to run a credit check on the Claimant and that he had to run a second credit check because the Claimant had been him a wrong Social Security number.

#### **Actual Loss**

COMAR 09.11.01.18 provides:

#### **.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.

For the following reasons, I find that the Claimant sustained an actual loss as the result of the Respondent's theft, embezzlement, fraud, and/or misrepresentation.

As discussed above, I have found that the Respondent did engage in the aforementioned conduct with regard to the Claimant's security deposit. Furthermore, the receipt entered into evidence established that the amount of the security deposit was \$1,200.00. Because I have found that the Respondent did not engage in such conduct with regard to the \$45.00 application fee, I find that the Claimant is not entitled to the recovery of that fee.

The Claimant also made a claim against the Fund for the following damages allegedly suffered by him as a result of the Respondent's acts or omissions;

Certified letters	\$ 5.60
Registered mail	\$ .44
Service of court documents	\$100.00
Lost wages	\$126.40
Court costs	\$ 28.00
Compensatory damages	\$2,400.00 <sup>11</sup>

The aforementioned alleged damages constitute consequential damages, which are not specifically excluded from the definition of "actual loss" set forth in COMAR. Nonetheless, the Claimant presented no documentation to support his claim for those alleged damages and, thus, failed to prove that he sustained them.

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<sup>11</sup> The Claimant did not explain what was included in this amount. I assume it included the \$45.00 application fee.

Accordingly, I find that the Claimant sustained an actual loss in the total amount of \$1,200.00.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant sustained an actual loss that is compensable by the Fund based on the Respondent's acts or omissions that constituted theft, embezzlement, fraud and/or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (2010); COMAR 09.11.03.04F.

I further conclude as a matter of law that the Claimant sustained an actual loss compensable by the Fund in the amount of \$1,200.00. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(1); COMAR 09.11.01.18.

### **RECOMMENDED ORDER**

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

**ORDER**, that the Claimant be reimbursed \$1,200.00 from the Maryland Real Estate Guaranty Fund to compensate for actual losses that he sustained because of the acts or omissions of the Respondent, and further,

**ORDER**, that the Respondent be ineligible for any Maryland Real Estate Commission license until the Respondent reimburses the Fund for all monies disbursed under this Order plus annual interest of at least ten percent, as set by the Commission; Md. Code Ann., Bus Occ. & Prof. § 17-411(a)(2) (2010), and further,

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

August 13, 2012  
Date Decision Mailed

**SIGNATURE ON FILE**  
Eileen C. Sweeney  
Administrative Law Judge

ECS/kke  
#136533

THE CLAIM OF JAMES HOUSE,	* BEFORE EILEEN C. SWEENEY,
CLAIMANT	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND	* OF THE MARYLAND OFFICE
REAL ESTATE COMMISSION	* OF ADMINISTRATIVE HEARINGS
GUARANTY FUND FOR	* OAH NO.: DLR-REC-22-12-08218
THE ALLEGED MISCONDUCT OF	* MREC NO.: 11-RE-296
HAKEEM DOSUNMU,	*
RESPONDENT	*
* * * * *	* * * * *

**FILE EXHIBIT LIST**

The Claimant offered the following exhibits that I admitted into evidence:

- CL #1            February 8, 2011 letter from Michael R. Zwarick to the Claimant
- CL #2            January 11, 2011 Writ of Summons, District Court of Maryland for Baltimore City, Case No: 010100006842011
- CL #3            May 23, 2011 letter from the Claimant to Ms. Oks Johnson

The Respondent did not offer any exhibits into evidence.

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

- Fund #1            April 26, 2012 Notice of Hearing
- Fund #2            May 31, 2012 memorandum from the OAH to Legal Services, with attachments
- Fund #3            The Respondent's driving record, signed by Thomas Marr, IV, Lead Investigator, MHIC, on June 8, 2012
- Fund #4            February 16, 2012 Order for Hearing, with attachment
- Fund #5            June 8, 2012 MREC licensing information
- Fund #6            March 22, 2011 letter from the MREC to the Respondent
- Fund #7            October 6, 2010 receipt; October 15, 2010 receipt