

FINAL ORDER

MAY 3 - 2011

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *

MARYLAND REAL ESTATE COMMISSION

v. *

KERRY WOODS *
Respondent *

* CASE NO. 2008-RE-063

And *

* OAH NO. DLR-REC-24-10-32546

CLAIM OF MELVIN AND KIM *
JOHNSON AGAINST THE MARYLAND *
REAL ESTATE GUARANTY FUND *

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated January 18, 2011, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 8th day of March, 2011

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, AFFIRMED;

C. That the Recommended Order be, and hereby is, AMENDED as follows:

ORDERED that the Respondent Kerry Woods violated Md. Bus. Occ. and Prof. Art. § 17-322(b)(14(ii), (25), (32), and (33); § 17-532(c)(1)(vi), and COMAR 09.11.01.07, 09.11.02.01H, and

09.01.03.08 those parties adversely affected by this Proposed Order shall have 20 days from the postmark date of the Order to file exceptions and to request to present arguments on the proposed decision before this Commission. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202.

SIGNATURE ON FILE

Maryland Real Estate Commission

SIGNATURE

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MARYLAND REAL ESTATE
COMMISSION

v.

KERRY WOODS,
RESPONDENT

AND

CLAIM OF MELVIN AND KIM

JOHNSON AGAINST THE MARYLAND

REAL ESTATE COMMISSION

GUARANTY FUND

* BEFORE MARY R. CRAIG,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO. : DLR-REC-24-10-32546
* MREC NO. : 2008-RE-0063

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On July 20, 2007, Melvin and Kim Johnson (Claimants) filed a complaint (Complaint) with the Maryland Real Estate Commission (REC) and a claim (Claim) against the REC Guaranty Fund (Fund) for reimbursement of losses allegedly caused by the acts and omissions of a licensed real estate agent, Kerry Woods (Respondent). The Claimants alleged that they sustained losses in connection with the sale of their residence, 5808 Kentucky Avenue, District Heights, Maryland (the Property).

On March 25, 2010, the REC filed a Statement of Charges and Order for Hearing (Charges) against the Respondent, alleging that he violated the Maryland Real Estate Brokers Act (the Act), Md. Code Ann., Bus. Occ. & Prof. §§ 17-101 to 702,¹ and the Code of Ethics for individuals licensed by the REC, Code of Maryland Regulations (COMAR) 09.11.02.01 & .02. On October 14, 2010, the REC filed an Amended Statement of Charges and Order for Hearing against the Respondent (Amended Charges). The Amended Charges alleged that the Respondent is subject to sanctions because he failed to properly obtain the release of the Claimants from a contract to sell their property, advised them to sell their property to a second buyer when it was still under contract to the first buyer, failed to maintain copies of pertinent documents concerning the transactions, and failed to provide the Claimants with a copy of their contract of sale. The Amended Charges also notified the Respondent of the Claim and informed him that the hearing would involve the issue of whether the Claimants are entitled to an award from the Fund due to a covered act or omission by the Respondent. The Amended Charges notified the Respondent that the REC sought sanctions against him pursuant to section 17-322(c) of the Act.

I held a hearing on the Charges and the Claim on November 5, 2010 at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Assistant Attorney General Peter Martin represented the REC. The Claimants represented themselves. The Respondent represented himself. Assistant Attorney General Chris King represented the Fund.

I heard this case pursuant to section 17-408 of the Act. Procedure in this case is governed by the provisions of the Administrative Procedure Act, the procedural regulations of the Department

¹ Chapter 274, Acts 2007, effective October 1, 2007, reenacted § 17-322(b)(3), (4) & (25) and (b)(33), and Chapter 282, Acts 2008, effective October 1, 2008, reenacted § 17-532, both without changing the text in the 2004 volume. All subsequent references are to sections of the Business Occupations and Professions Article of the Maryland Annotated Code (2004), unless otherwise stated.

of Labor, Licensing and Regulation, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); COMAR 09.01.03 and 28.02.01.

ISSUES

1. Did the Respondent violate the Act or the REC Code of Ethics?
2. Should the Respondent be subject to a suspension and/or a civil penalty?
3. Did the Claimants prove that they sustained an actual loss as a result of the Respondent's alleged misconduct?

SUMMARY OF THE EVIDENCE

Exhibits

An Exhibit List is attached to this Proposed Decision.

Witnesses

The Claimant, Mrs. Kim Johnson, and Susie Ridgley, the first buyer's agent, testified in support of the Claim and on behalf of the REC. The Respondent testified in support of his case. The Fund presented no witnesses.

FINDINGS OF FACT

Having considered all of the evidence presented, I find the following facts by a preponderance of the evidence:

1. The Respondent has been licensed by the REC as a real estate salesperson since May 5, 2003 under REC license #576350.
2. The Respondent's license will expire May 6, 2011, unless it is renewed.
3. The Respondent has no prior disciplinary violations on his license.
4. The Claimants owned a residence located at 5808 Kentucky Avenue, District Heights, Maryland (Property).

5. On or about March 1, 2005, the Claimants entered into a listing agreement with the Respondent whereby the Respondent agreed to list the Property for sale and to act as the Claimants' real estate agent in connection with the sale of the Property.
6. On or about March 31, 2005, Melanie Dockery (Buyer #1), through her agent, Susie Ridgley, submitted an offer to purchase the Property from the Claimants for \$275,600.00.
7. On April 1, 2005, the Claimants met with the Respondent and accepted the offer, signing the contract of sale (Contract).
8. Paragraph 9 of the Contract stated as follows:

LOAN APPLICATION AND APPROVAL.

- A. **FINANCING APPLICATION.** The [Buyer] will make written application for the financing or assumption called for in the Contract ("Specified Financing") within 7 days after Date of Ratification. The Purchaser grants permission for the Selling Company and the lender to disclose to the Listing Company and the Seller general information available about the progress of the loan application and loan approval process.
- B. **LENDER'S APPROVAL CONTINGENCY.** This Contract is contingent until 9 p.m. 15 days after Date of Ratification ("Deadline") upon the Purchaser delivering to the Seller a letter from the lender stating that the Purchaser is approved for the Specified Financing ("Lender's Letter"). Upon Seller's receipt of the Lender's Letter, this Contract is no longer contingent on the Purchaser being approved for the Specified Financing and the Contract will remain in full force and effect. **TIME IS OF THE ESSENCE.**
 - i. If the Purchaser does not Deliver the Lender's Letter by the Deadline, the lender's approval contingency will continue, unless the Seller at the Seller's option gives Notice to the Purchaser that this Contract will become void. If the Seller Delivers such Notice this Contract will become void at 9 p.m. on the third day following Delivery of Seller's Notice unless prior to that date and time:
 - a. Purchaser delivers to Seller the Lender's Letter; OR
 - b. Purchaser removes the **LENDER'S APPROVAL CONTINGENCY** and provides Seller with evidence of sufficient funds available to complete Settlement without obtaining financing.
 - ii. The Purchaser may substitute alternative financing for Specified Financing provided:

- a. There is no additional expense to the Seller; and
 - b. The Settlement Date is not delayed.
 - ii. If prior to satisfaction or removal of the LENDER'S APPROVAL CONTINGENCY the Purchaser receives a written rejection for the Specified Financing and Delivers a copy of the written rejection to the Seller, this Contract will become void.
9. The Respondent failed keep and to provide the Claimants with a legible copy of the Contract.
 10. Buyer #1 did not obtain financing by April 30, 2005.
 11. The Respondent told the Claimants that, if Buyer #1 did not get financing by April 30, 2005, the Contract became null and void.
 12. On or about May 15, 2005, the Respondent prepared, and the Claimants signed, a document notifying Buyer #1 that, due to her inability to obtain financing, the Contract was null and void.
 13. The Respondent lost that document and never forwarded it to Buyer #1 or Ms. Ridgley.
 14. On May 17, 2005, Ms. Ridgley sent the Respondent a fax informing him that Buyer #1 had obtained financing for \$248,000.00 and that she intended to go to settlement. Ms. Ridgley enclosed a copy of the loan approval. The Respondent discussed with the Claimants whether they should accept less than the Contract price, and the Claimants decided that they would not modify the Contract to lower the price.
 15. The Respondent presented the Claimants with a \$280,000.00 offer from Brandon Brown (Buyer #2) dated May 21, 2005.
 16. The Respondent told the Claimants that their contract with Buyer #1 was void and that they could accept the offer from Buyer #2.
 17. The Claimants accepted Buyer #2's offer on May 25, 2005 and sold the Property to

- him on June 6, 2005. The Respondent advised the Claimants that they were free to sell the Property to Buyer #2.
18. The Claimants relied on the Respondent's advice in selling the Property to Buyer #2.
 19. The Claimants moved out of Maryland after they sold the Property. On or about June 15, 2005, the Respondent asked the Claimants to sign another document declaring the Contract null and void.
 20. On the Respondent's advice, the Claimants signed a document on June 15, 2005 declaring the Contract null and void (Rescission). They faxed the Rescission to the Respondent on June 17, 2005. The Respondent told the Claimants that he needed the Rescission in order to get his commission from the sale of the Property to Buyer #2, but in reality he intended to use it to defend against Buyer #1's lawsuit.
 21. The Respondent never sent the Rescission to Buyer #1 or Ms. Ridgley.
 22. Buyer #1 filed a lawsuit alleging breach of contract against the Claimants and the Respondent in the Superior Court for the District of Columbia. That case was dismissed and re-filed in the Circuit Court for Prince George's County.
 23. The Claimants were not represented by an attorney in connection with either lawsuit; the Respondent was represented by an attorney.
 24. In order to defend against Buyer #1's claim, the Claimants repeatedly asked the Respondent for copies of all of the documents in his possession involving the sale of the Property. The Respondent told them that he lost his file; he never gave them any copies.
 25. The Respondent was dismissed from the Prince George's County lawsuit, which proceeded to a jury trial against the Claimants.

26. After a jury trial, Buyer #1 obtained a judgment against the Claimants for \$50,000.00 for breach of contract on January 14, 2008.
27. Buyer #1, through counsel, used the Rescission in the lawsuit to prove that the Claimants had not cancelled the Contract prior to settlement with Buyer #2.
28. On July 20, 2007, the Claimants filed a Fund claim against the Respondent.

DISCUSSION

Because the Claim against the Fund and the Charges arose from the same facts and circumstances, I heard them in one proceeding. Accordingly, I considered the evidence presented in this case in determining the merits of both the regulatory Charges and the Fund Claim.

The REC, as the moving party on the Charges, has the burden of proving that the Respondent violated the statutory and regulatory sections at issue; the Claimants, as the moving parties on the Claim, have the burden of proving that they suffered an actual loss as the result of the Respondent's misconduct, all by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2004); *Maryland Comm'r of Labor and Industry v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996) (quoting *Bernstein v. Real Estate Comm.*, 221 Md. 221, 231 (1959)). I find that the REC met its burden of proving all of the Charges and the Claimants met their burden with respect to the Claim.

The Regulatory Charges

The REC charged the Respondent with violating the following provisions of the Act and the REC regulations:

§ 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:

...

(14) for any transaction in which the licensee has served as or on behalf of a real estate broker, fails to furnish promptly to each party in the transaction, a copy of:

...

(ii) the contract of sale;

(15) for any transaction in which the licensee has served as or on behalf of a real estate broker, fails to keep a copy of any executed:

...

(ii) contract of sale;

...

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

...

(32) violates any other provision of this title; [or]

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

...

§ 17-532. Duties to client ...

(c) *In general.* – (1) A licensee shall:

...

(vi) exercise reasonable care and diligence;

....

CODE OF MARYLAND REGULATIONS 09.11

Chapter 01 General Regulations

07. Records of Transactions.

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 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 escrow 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 filed representatives, or other employees.

...

Chapter 02 Code of Ethics

.01 Relations to the Public ...

H. For the protection of all parties with whom the licensee deals, the licensee shall see to it that financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreement of the parties, and that copies of these agreements are placed in the hands of all parties involved within a reasonable time after the agreements are executed.

...

.02 Relations to the Client.

A. 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.

I conclude that the REC proved all of the alleged statutory and regulatory violations. The evidence establishes convincingly that the Respondent represented the Claimants as the listing agent in connection with their sale of the Property. The Claimants agreed to sell the Property to Buyer #1, with a contingency for financing. Buyer #1 had difficulty obtaining the amount of financing needed to go to settlement. The Claimants met with the Respondent, who advised them that Buyer #1's failure to obtain financing relieved them of their obligations to her under the Contract. The Respondent told the Claimants that, once they signed a release, the Contract was null and void and they had the right to proceed to sell the Property to Buyer #2. The

Claimants reasonably relied on the Respondent for advice. To this point, the facts are undisputed.

The Respondent testified that Ms. Ridgley told him that Buyer#1 refused to sign a mutual release, so he prepared the Rescission and sent it to Ms. Ridgley before the Claimants agreed to sell the Property to Buyer #2. I did not find the Respondent's testimony credible for the following reasons: Ms. Ridgley testified clearly and consistently that her client refused to release the Claimants from their obligations under the Contract, continued to pursue financing, and wanted to buy the Property. She further testified that the Respondent never sent her any document from the Claimants declaring the Contract null and void. Finally, Buyer #1 sued the Claimants and recovered a judgment against them for breach of contract based on Buyer #1's testimony (and other evidence) that the Claimants were obligated to sell her the Property once she obtained financing. If the Claimants had notified Buyer #1 that the Contract was null and void, she could not have secured a judgment on a breach of contract claim.

The Respondent offered no corroboration for his testimony. He testified that he gave all of his documents to his attorney in connection with the defense of Buyer #1's claim, but he did not attempt to get copies from the attorney once he was served with the Amended Charges. If the documents existed, as the Respondent claimed, he would have produced them from his attorney's files, to which he was entitled access.

I conclude that once Buyer #1 failed to obtain financing, the Respondent incorrectly advised the Claimants to sell the Property to Buyer #2, even though the Property was still under contract to Buyer #1. When Buyer #1 sued him, the Respondent sent the Claimants a document declaring the Contract null and void. That document, signed after the settlement on the Property and its sale to Buyer #2, was insufficient to protect the Claimants from liability to Buyer #1.

Before and after Buyer #1 sued them, the Claimants asked the Respondent for copies of all of the relevant documents. He never provided any of them. The Respondent had a duty to retain copies of the relevant documents and to provide them to the Claimants. Over a month after the Claimants sold the Property, the Respondent asked them to sign the Rescission, on the pretext that he needed it to get his commission from the sale. The Claimants complied, and that document hurt their case. I conclude that the Respondent was not truthful with the Claimants about the reason for his request that the Claimants sign the Rescission; he requested it to defend against Buyer #1's lawsuit.

Buyer #1 ultimately obtained a verdict from a jury in her breach of contract case against the Claimants; as a result, the Claimants have a \$50,000.00 judgment against them. For reasons which were unclear to me from the hearing, Buyer #1's lawsuit against the Respondent was dismissed. It is outrageous and manifestly unfair that the Claimants ended up with a judgment against them for actions they took in reliance on the Claimant's advice, while the Respondent was not held liable.

In summary, I conclude that the Respondent is subject to sanctions under sections 17-322(b)(14)(ii), 17-322(b)(33), and COMAR 09.11.02.01H for failing to provide the Claimants with a legible copy of the Contract. He is subject to sanctions under sections 17-322(b)(15)(ii), 17-322(b)(33) and COMAR 09.11.01.07 for failing to keep an executed copy of the Contract and other documents related to the transaction.

I conclude that the Respondent is subject to sanctions under section 17-322(b)(25) for incompetently advising the Claimants that they could enter into a contract with Buyer #2 and sell the Property to him while the Contract was still in full force and effect.

I further conclude that the Respondent is subject to sanctions under section 17-322(b)(25)

for dishonest dealings with the Claimants by misrepresenting to them the reason why he asked them to sign the Rescission.

Finally, I conclude that the Respondent is subject to sanctions under sections 17-322(b)(32) and section 17-532(c)(1)(vi) for failing to exercise reasonable care and diligence in the advice he gave the Claimants regarding cancellation of the Contract and signature of the contract with Buyer #2.

The Appropriate Regulatory Sanction

The purpose of the regulatory statute is to “protect the public in its dealings with real estate brokers, to place a duty of good faith and fair dealing on real estate brokers.” *Gross v. Sussex Incorporated*, 332 Md. 247, 274 (1993).

Section 17-322(c)(1) of the Act allows the REC to impose a financial penalty, not exceeding \$5,000.00, for every violation of section 17-322. The REC sought a \$5,000.00 penalty against the Respondent and a thirty day suspension. Section 17-322(c)(2) directs me to consider the seriousness of the violation, the harm caused by the violation, the good faith of the licensee, and any history of previous violations in determining the appropriate penalty. Of those factors, the only one in the Respondent’s favor is the absence of previous violations.

The violations proven were serious. The Claimants relied on the Respondent and he provided them bad advice on a matter clearly within the scope of his representation. He either lost all of their files or failed to provide them with copies, even after the Claimants were sued and badly needed the documents to defend themselves. The Respondent’s conduct caused the Claimants serious harm in the form of a \$50,000.00 judgment. I agree with the recommended sanction and propose that the REC suspend the Respondent’s license for thirty days and impose a penalty of \$5,000.00 for his violations of the law in this case.

Guaranty Fund Claim

The Claimants bear the burden of proof in their Claim against the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e). Claims for reimbursement from the Fund are governed by section 17-404 of the Act. COMAR 09.11.03.04 further provides guidance with respect to claims against the Fund. The Claimant satisfied all of the requirements for recovery against the Fund.

Section 17-410(b)(1)(2004) of the Act provides that “[t]he Commission may order payment by the Guaranty Fund only for the actual monetary loss suffered by the claimant as a result of the claim proven by the claimant.” See COMAR 09.11.01.18 (Fund recovery limited to actual monetary loss). The term “actual loss” is not defined in the statute, regulation or any reported appellate decision. Interpreting it in the context of the statute, it means an economic loss suffered by the Claimant as a result of proven misconduct by the Respondent.

The Claim is premised on the same facts that, as I have already discussed, proved that the Respondent violated section 17-322 and 17-532 of the Act as well as the REC’s regulations. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a). It goes without saying that the Respondent was acting as a real estate agent in connection with the Claimants’ sale of the Property at the time he committed errors and omissions. He obtained a commission from the sale of their Property to Buyer #2 by misrepresenting to the Claimants the purpose for the Rescission. The Claimants proved their claim by a preponderance of the evidence.

The Claimants sought recovery from the Fund for the \$50,000.00 judgment against them and in favor of Buyer #1. In addition, they seek reimbursement for out-of-pocket expenses, such as mileage for trips to court, parking at their deposition, copies of pleadings, law books, and other miscellaneous expenses. While I am sure that the Claimants incurred these expenses in their defense of the lawsuit, I am not permitted by the law to award them more than \$25,000.00.

Md. Code Ann., Bus. Occ. & Prof. § 17-410(b)(2). Therefore, I recommend that the Fund award them \$25,000.00.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Respondent violated Md. Code Ann., Bus Occ. & Prof. § 17-322(b)(14)(ii), (15)(ii), (25), (32) and (33), § 17-532(c)(1)(vi) and COMAR 09.11.01.07, 09.11.02.01H, and 09.11.02.02A by failing to maintain and provide the Claimants with a copy of the Contract and related documents, misadvising them that they were free to enter into a contract with Buyer #2, and misrepresenting to them the reason why he was requesting them to sign a document after settlement with Buyer #2.

I further conclude that the Respondent is subject to a \$5,000 fine for violations of the Maryland Real Estate Brokers Act pursuant to Md. Code Ann., Bus. Occ. & Prof. § 17-322(c) (2010).

I further conclude that the REC may suspend the Respondent's license for thirty days pursuant to Md. Code Ann., Bus. Occ & Prof. § 17-322(b) (2010).

Finally, I recommend that the Claimants are entitled to payment of \$25,000.00 from the Maryland Real Estate Commission Guaranty Fund pursuant to Md. Code Ann., Bus. Occ. & Prof. §§ 17-401 through 17-412 (2010) and COMAR 09.11.01.18, 09.11.03.04.

RECOMMENDED ORDER

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

ORDER that the Respondent violated Md. Code Ann., Bus Occ. & Prof. §§ 17-322(b)(14)(ii), (15)(ii), (25), (32), (33), 17-532(c)(1)(vi), and COMAR 09.11.01.07, 02.01H, and 09.11.02.02A;

ORDER that the Respondent be fined in the amount of \$5,000.00 pursuant to Md. Code

Ann., Bus. & Occ. Prof. § 17-322(c) (2010);

ORDER that the Respondent's license be suspended for a period of thirty days pursuant to Md. Code Ann., Bus. & Occ. Prof. § 17-322(b) (2010);

ORDER that the Claimants' Guaranty Fund Claim against the Respondent be allowed in the amount of \$25,000.00 pursuant to Md. Code Ann., Bus. Occ. & Prof. §§ 17-401 through 17-412 (2010), COMAR 09.11.01.18, 09.11.03.04;

ORDER that the Respondent is ineligible for a license until the civil penalty has been paid and the Fund reimbursed; and

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

January 18, 2011
Date Decision Mailed

MRC/rbs
DOC #117965

SIGNATURE ON FILE

Mary R. Craig
Administrative Law Judge

SIGNATURE

SIGNATURE

SIGNATURE