

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**IN THE MATTER OF THE CLAIM
OF CYNTHIA SIGWORTH,
CLAIMANT**

v.

**THE MARYLAND REAL
ESTATE COMMISSION
GUARANTY FUND FOR THE
ALLEGED MISCONDUCT OF
DAVID HERBST, RESPONDENT**

CASE NO. 2019-RE-210

OAH NO. DLR-REC-22-19-12272

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated July 29, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 21st day of August, 2019, hereby **ORDERED:**

A. That the Findings of Fact in the recommended decision be, and hereby are **AFFIRMED.**¹

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 AMENDED** as follows:

ORDERED that once this Proposed Order becomes a Final Order and all

¹ The Commission notes the following harmless typographical errors requiring correction for clarity only:

- On page 1 of the recommended decision, the ALJ wrote that Claimant's claim was initially for \$51,200.00, it was actually for \$1,200.00. GF Ex. 3.
- The full address for the property at issue is Ocean Point III, 9 41st Street, Unit 332, Ocean City, Maryland.
- On page 3 of the recommended decision the ALJ identifies exhibits including GF Ex. 4, Respondent's licensing history, which is dated May 25, 2019, not March 14, 2019.

rights to appeal are exhausted, the Claimant, **Cynthia Sigworth**, be reimbursed from the Maryland Real Estate Guaranty Fund in the amount of **One Thousand Twenty Eight Dollars and Seventy Five Cents (\$1,028.75)**;

ORDERED that all real estate licenses held by the Respondent, **David Herbst**, shall be suspended from the date this Proposed Order becomes a Final Order and all rights to appeal are exhausted and shall not be reinstated until the Maryland Real Estate Guaranty Fund is reimbursed, including any interest that is payable under the law and application for reinstatement is made;

D. That the records, files, and documents of the Maryland Real Estate Commission reflect this decision.

E. Pursuant to Annotated Code of Maryland, State Government Article § 10-220, the Commission finds that the recommended decision of the Administrative Law Judge required modification because it omitted from the Recommended Order that Respondent's license be suspend until the Maryland Real Estate Guaranty Fund (and any interest) is repaid and included minor typographical errors.

F. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.09 those parties adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of the Order to file written exceptions to this Proposed Order. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202. If no written exceptions are filed within the twenty (20) day period, then this Proposed Order becomes final.

G. Once the Proposed Order becomes final, the parties have an additional thirty (30) days in which to file an appeal to the Circuit Court for the Maryland County in which the

Appellant resides or has his/her principal place of business, or in the Circuit Court for Baltimore City.

MARYLAND REAL ESTATE COMMISSION

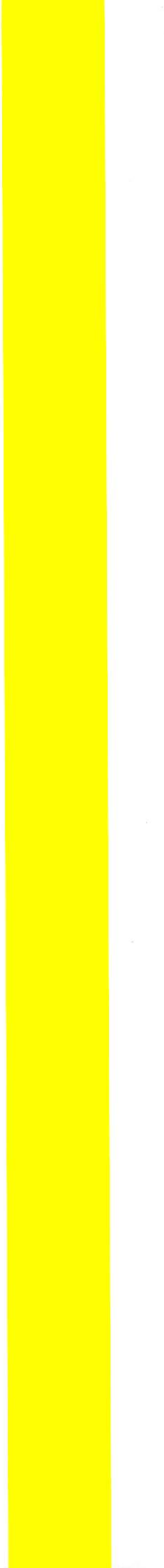
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By: _____

August 21, 2019
Date

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IN THE MATTER OF THE CLAIM
OF CYNTHIA SIGWORTH,
CLAIMANT

v.

THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND
FOR THE ALLEGED MISCONDUCT
OF DAVID HERBST,
REAL ESTATE BROKER,
RESPONDENT

* BEFORE GERALDINE A. KLAUBER,
* ADMINISTRATIVE LAW JUDGE,
* THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH CASE No. DLR-REC-22-19-12272
* REC COMPLAINT No. 19-RE-210

* * * * *

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 October 4, 2018, Cynthia Sigworth (Claimant) filed a claim against the Maryland Real Estate Commission (REC) Guaranty Fund (Fund) for \$51,200¹ for monetary losses allegedly incurred by the Claimant as a result of the misconduct of David Herbst (Respondent), a licensed real estate broker, in providing property management services to the Claimant for real property located at Ocean Point III, Unit 332, Ocean City, Maryland (the Property).

¹ The Claimant modified this amount during the hearing, as discussed below.

On April 2, 2019, the REC issued an Order for Hearing. On April 19, 2019, the REC transmitted the matter to the Office of Administrative Hearings (OAH) for a hearing on the Claimant's claim against the Fund.

On June 10, 2019, I conducted a hearing at the OAH in Rockville, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2018). The Claimant represented herself. After waiting more than fifteen minutes, the Respondent failed to appear. Andrew Brouwer, Assistant Attorney General for the Department of Labor Licensing and Regulation (DLR) represented the Fund.

On April 24, 2019, the OAH mailed the Respondent Notice of the Hearing (Notice) by regular and certified mail to the Respondent's address of record. On April 26, 2019, the Respondent signed the certified mail return receipt card, acknowledging service of the Notice. Therefore, I determined that the Respondent received proper notification, but failed to appear for the hearing. As a result, I found it appropriate to proceed in the Respondent's absence. Code of Maryland Regulations (COMAR) 28.02.01.23A.

The Administrative Procedure Act, the procedural regulations of Labor and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); Code of Maryland Regulations (COMAR) 09.01.02, 09.01.03, 09.11.03.02; and COMAR 28.02.01.

ISSUES

Did the Claimant sustain an actual loss as a result of an act or omission of the Respondent that constitutes theft, embezzlement, false pretenses, forgery, misrepresentation, or fraud?

If the Claimant sustained an actual loss, what was the amount of the loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- GF Ex. 1 Hearing Order, April 2, 2019;
- GF Ex. 2 Notice of Hearing, April 24, 2019;
- GF Ex. 3 Complaint, October 4, 2018; Addendum to Complaint, October 28, 2018;
- GF Ex. 4 DLR Licensing history of the Respondent, March 14, 2019.

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

- Clmt. Ex. 1 Memo from the Respondent to All Owners, undated; Listing for 2018 rental season;
- Clmt. Ex. 2 Screen shot of Claimant's rental calendar, July 31, 2018; Screen shot of Claimant's rental calendar, October 28, 2018;
- Clmt. Ex. 3 Statement Summary, July 10, 2018;
- Clmt. Ex. 4 Statement Summary, August 1, 2018;
- Clmt. Ex. 5 Letter from Allen Herbst to Claimant, September 7, 2018
- Clmt. Ex. 6 Statement dated February 2, 2018

No exhibits were offered on behalf of the Respondent, who failed to appear.

Testimony

The Claimant testified on her own behalf.

The Respondent failed to appear and no testimony was provided on his behalf.

The Fund presented no testimony.

FINDINGS OF FACT

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

1. At all times relevant to this case, the Respondent was a licensed real estate broker, who traded as Condo Realty, Inc. The Respondent provided property management services, handling the rentals of condominium units in Ocean City, Maryland.
2. The Claimant is the owner of the Property, a one bedroom condominium unit located in Ocean City, Maryland.
3. On or about October 17, 2017, the Claimant and the Respondent entered into an agreement for the Respondent to act as the Claimant's exclusive rental agent for the 2018 rental season.
4. Under the agreement, the Respondent collected rental payments and deposits from tenants on behalf of the Claimant. The Claimant paid the Respondent 15% of the gross rental for weekly rentals.
5. The Respondent charged the Claimant a cleaning fee of \$40.00 to be deducted from each rental.
6. The Property was rented for the period of July 4- 8, 2018.
7. The Claimant did not receive any payment from the Respondent for the July 4-8, 2018 rental. The Respondent owed the Claimant \$385.00, which was the \$500.00 rental rate, less a commission of \$75.00 and a \$40.00 cleaning fee.
8. The Property was rented for the period of August 4-11, 2018 at a weekly rental rate of \$730.00.
9. The Claimant received \$365.00 out of the \$730.00 owed for the Property rental of August 4-11, 2018. The Respondent owed the Claimant the \$325.00 for the rental, which constituted the \$365.00 balance, minus a \$40.00 cleaning fee.

10. The Property was rented for the period of August 23 - 26, 2018 at the nightly rate of \$125.00.

11. The Claimant did not receive any payment from the Respondent for the August 23-26, 2018 rental. The Respondent owed the Claimant \$318.75, which was the \$375.00 rental amount minus the commission of \$56.25.

12. The Property was not cleaned after the August 23-26, 2018 rental.

13. After deducting the allowable commissions and cleaning fees, the Respondent failed to reimburse the Claimant \$1,028.00 in rental fees.

DISCUSSION

The burden of proof at a hearing on a claim against the Fund is on the “claimant to establish the validity of the claim.” Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2018). Section 17-404 of the Business Occupations & Professions article governs all claims brought against the Fund and sets forth the following criteria that must be established by a claimant to obtain an award:

(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;
2. a licensed associate real estate broker;
3. a licensed real estate salesperson; or
4. an unlicensed employee of 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.

(b) The amount recovered for any claim against the Guaranty Fund may not exceed \$50,000 for each claim.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a), (b) (2018). *See also* COMAR

09.11.01.14.

The Claimant owns a one bedroom condominium in Ocean City, Maryland. The Claimant entered into a property rental agreement with the Respondent for the 2018 rental season. Pursuant to the agreement, the Respondent was to be paid a fifteen percent commission of the gross rentals. The Claimant also agreed to have a cleaning fee of \$40.00 deducted from the rentals. The Claimant established through documentation and testimony that she did not receive full compensation from the Respondent for three rentals during the 2018 rental season. The Claimant submitted screen shots of the Respondent's on-line vacation rental calendars for the Property, which reflected the dates the Property was rented. The documentation established that the Property was rented from July 4 - 8, 2018. The Claimant was due \$500.00 in rent for that period minus the commission of fifteen percent, \$75.00, and a \$40.00 cleaning fee, which left a balance due of \$385.00.

The Claimant further established that the Property was rented from August 4 - August 11, 2018. The weekly rental for that week was \$730.00. The Claimant submitted a statement from the Respondent which reflected the Claimant was paid \$255.00, which consisted of a deposit of \$365.00 less a fifteen percent commission on the \$730.00 (\$109.50). The Claimant did not receive any additional funds from the Respondent for this rental. The Respondent owed the Claimant the additional \$365.00, less the \$40.00 cleaning fee, for a total of \$325.00.

The third rental period for which the Respondent did not compensate the Claimant was for the dates of August 23-26, 2018. The rental rate was \$125.00 per night for a total of \$375.00. The Respondent was due a fifteen percent commission of \$56.25. The Claimant testified that she visited the Property on August 26, 2018 and it did not appear to have been cleaned; therefore a cleaning fee was not owed to the Respondent. The Respondent owed the Claimant \$318.75 for this rental.

The Respondent failed to appear at the hearing to rebut the Claimant's evidence which established that the Respondent failed to pay the Claimant \$1,028.75 in rent collected for the Property. The Fund maintained that the Respondent's failure to disburse all the funds collected to the Claimant constituted a misrepresentation. I agree with the Fund's recommendation of an award to the Claimant of \$1,028.75. The Claimant is entitled to an award from the Fund in this amount for her actual loss based on the Respondent's misrepresentation in the provision of real estate services.

CONCLUSIONS OF LAW

Based on the above Findings of Fact 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 was obtained on behalf of the Claimant but not remitted in full to the Claimant, which constitutes misrepresentation in the provision of real estate services. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2) (2018).

I further conclude as a matter of law that the Claimant is entitled to receive an award from the Fund in the amount of \$1,028.75. *Id.*; COMAR 09.11.01.14.

RECOMMENDED ORDER

I **PROPOSE** that the Claim filed by the Claimant against the Maryland Real Estate Guaranty Fund be **GRANTED** in the amount of \$1,028.75.

July 29, 2019
Date Decision Issued

SIGNATURE ON FILE

Geraldine A. Klauber
Administrative Law Judge

GAK/sw
#181145

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