

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**IN THE MATTER OF THE CLAIM
OF MARK FELSE AND PRECIOUS,
HALILI FELSE, CLAIMANTS**

v.

**THE MARYLAND REAL
ESTATE COMMISSION
GUARANTY FUND FOR THE
ALLEGED MISCONDUCT OF
DUANE FARLEY, RESPONDENT**

CASE NO. 2018-RE-366

OAH NO. DLR-REC-22-18-36392

* * * * *

PROPOSED ORDER

The Findings of Fact, Proposed Conclusions of Law and Recommended Order of the Administrative Law Judge (“ALJ”) dated June 26, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission (“Commission”), this 21st day of August, 2019, hereby **ORDERED**:

- A. That the Findings of Fact¹ in the proposed decision be, and hereby are, **AFFIRMED**.
- B. That the Proposed Conclusions of Law in the proposed decision be, and hereby are, **APPROVED**.
- C. That the Recommended Order in the proposed decision be, and hereby is, **ADOPTED**.
- D. That the records, files, and documents of the Maryland Real Estate Commission

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

- On page 4 the ALJ identifies exhibits including:
 - GF Ex. 5, Respondent’s licensing history, which is dated January 30, 2019, not undated; and
 - GF Ex. 8, The Claimants’ Complaint, which is dated February 12, 2018, not August 6, 2018.
- In the last paragraph on page 5 the ALJ refers to the Commission’s Hearing Order and cites to GF Ex. 1. It is actually located in GF Ex. 3.

reflect this decision.

E. 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

SIGNATURE ON FILE

August 21, 2019

Date

By: _____

**IN THE MATTER OF THE
CLAIM OF MARK FELSE AND
PRECIOUS HALILI FELSE,
CLAIMANTS**

v.

**MARYLAND STATE
REAL ESTATE COMMISSION,
REAL ESTATE GUARANTY FUND,
FOR THE ALLEGED MISCONDUCT
OF DUANE FARLEY,
RESPONDENT**

*** BEFORE NICOLAS ORECHWA,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS**

*** OAH No.: DLR-REC-22-18-36392**

*** REC No.: 18-RE-366**

*** * * * ***

PROPOSED DECISION

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

STATEMENT OF THE CASE

On February 12, 2018, Mark Felse (Mark) and Precious Halili Felse (Precious) (collectively “the Claimants”) filed a complaint against Duane Farley, Real Estate Broker (Respondent). The Claimants also filed a claim with the Maryland Real Estate Commission Guaranty Fund (MREC or Fund), in which they alleged they sustained monetary losses as a result of the Respondent’s acts or omissions. Specifically, the Claimants alleged the Respondent, acting in her capacity as the property manager for property owned by the Claimants, failed to

reimburse the Claimants for various monies to which the Claimants were rightfully entitled. On November 9, 2018, the MREC ordered a hearing be set for the Claimants to establish their eligibility for an award from the Fund. On November 21, 2018, the MREC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On April 8, 2019, at 9:30 a.m., I conducted a hearing at the OAH headquarters in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2018).¹ The Claimants appeared and represented themselves. Jessica Berman Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation, represented the Fund. After waiting fifteen minutes, neither the Respondent nor anyone on her behalf appeared at the hearing or requested a postponement.

On February 12, 2019, the OAH mailed a notice of the hearing (Notice) to the Respondent by certified and regular mail to The Estate of Duane Farley,² c/o Thomas Kokolis and Jacob Deaven, Parker, Simon & Kokolis, LLC, 110 North Washington Street, Suite 500, Rockville, Maryland, 20850, the Respondent's last known address of record on file with the MREC. *Id.* § 17-408(c).³ The Notice advised the Respondent of the time, place, and date of the hearing. The United States Postal Service (USPS) did not return the Notice as unclaimed or undeliverable. On February 19, 2019, the OAH received the signed return receipt for the Notice. I received no forwarding order or other correspondence from the Respondent to identify alternative addresses. 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. *Id.* § 17-408(c); Code of Maryland Regulations (COMAR) 28.02.01.23A.

¹ Unless otherwise noted, all references hereinafter to the Business Occupations and Professions Article are to the 2018 Replacement Volume of the Maryland Annotated Code.

² As set forth in further detail below, the Respondent is deceased and all correspondence and interaction with regard to the Claim concerns the Respondent's estate. However, for the sake of simplicity, I will simply refer to the Estate of Duane Farley as the Respondent for the balance of this decision.

³ "The Commission may not proceed with the hearing unless the records of the Commission show that all notices required under this subtitle were sent to each licensee and each unlicensed employee alleged to be responsible for the act or omission giving rise to the claim." Bus. Occ. & Prof. § 17-408(c).

The contested case provisions of the Administrative Procedure Act, the Department's and the MREC's procedural regulations, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 09.01.03; COMAR 09.11.03; and COMAR 28.02.01.

ISSUES

1. Did the Claimants sustain an actual monetary loss as a result of the Respondent's conduct that constituted theft, embezzlement, forgery, false pretenses, fraud, or misrepresentation; and, if so,
2. What is the amount of the actual loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits for the Claimants:

- CL Ex. 1: Residential Dwelling Lease, 1711 Fleetwood Drive, Bel Air, Maryland 21015, November 22, 2016
- CL Ex. 2: Residential Dwelling Lease, 1225 Tanner Place, Belcamp, Maryland 21017
- CL Ex. 3: Various Bank of America Statements from the Claimants
- CL Ex. 4: Farley Property Management Information packet
- CL Ex. 5: E-mails between the Claimants and the Respondent
- CL Ex. 6: Final Checks and Statements from the Respondent
- CL Ex. 7: Timeline for Claim
- CL Ex. 8: Statements from the Respondent and receipts, various dates 2017

I admitted the following exhibits for the Fund:

- GF Ex. 1: OAH Hearing Notice, February 12, 2019
- GF Ex. 2: OAH Hearing Notice, January 16, 2019
- GF Ex. 3: OAH Hearing Notice, November 29, 2018, returned unclaimed
- GF Ex. 4: MREC Transmittal to the OAH.
- GF Ex. 5: Respondent's Licensing History, undated
- GF Ex. 6: Affidavit of Jillian Lord, January 15, 2019
- GF Ex. 7: Printout from Maryland Register of Wills, undated
- GF Ex. 8: The Claimants' Complaint, August 6, 2018

The Respondent did not offer any exhibits.

Testimony

The Claimants testified on their own behalf. The Respondent and the Fund did not present witnesses.

FINDINGS OF FACT

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

1. At all times relevant, the Respondent was a real estate broker licensed by the MREC under License #0148951. In particular, the Respondent managed properties on behalf of owners who rented their properties to third parties.
2. At all times relevant, the Claimants owned residences located at 1711 Fleetwood Drive, Bel Air, Maryland 21015 (Fleetwood Drive) and 1225 Tanner Place, Belcamp, Maryland 21017 (Tanner Place).⁴
3. In 2004, the Claimants entered into a Property Management Agreement with the Respondent.

⁴ For the sake of simplicity, I shall refer to Fleetwood Drive and Tanner Place collectively as "the properties."

4. On November 22, 2016, Ronald C. Jones Sr. (Jones) and Dana Cherell Mason (Mason) (collectively “the Fleetwood Drive tenants”) entered into a lease to rent Fleetwood Drive. The lease obligated the Fleetwood Drive tenants to provide a security deposit in the amount of \$4,390.00. The Fleetwood Drive tenants provided the security deposit to the Respondent in full.

5. On November 18, 2017, George Fletcher (Fletcher) entered into a lease to rent Tanner Place. The lease obligated Fletcher to provide a security deposit in the amount of \$1,295.00. Fletcher provided the security deposit to the Respondent in full.

6. The Respondent terminated the Property Management Agreement and closed her business on April 1, 2018. The Respondent died on June 24, 2018.

7. The Claimants attempted to get the Respondent to return the security deposits on numerous occasions. Neither the Respondent nor anyone on her behalf responded to the Claimants.

8. The Respondent never returned the security deposits for the properties to the Claimants. Per the terms of the leases for the properties, the Claimants are obligated to return the security deposits to the Fleetwood tenants and Fletcher when they move out of the respective properties.

DISCUSSION

The Respondent’s Failure to Appear

Per the MREC’s Hearing Order, the Respondent died on June 24, 2018. (GF Ex. 1.) The OAH scheduled the hearing in this case for Monday, April 8, 2019, at 9:30 a.m., at the OAH offices in Hunt Valley, Maryland. The OAH originally mailed the Notice to the parties on November 29, 2018. The OAH sent the Respondent’s copy of the Notice by first-class and

certified mail (return receipt requested) to 327 South Union Avenue, Havre De Grace, Maryland, 21078, the Respondent's address of record with the MREC when she was alive. The OAH addressed the Notice to the attention of the Respondent's estate. The OAH sent the Notice by certified mail, and the USPS returned it to the OAH as "moved left no address, unable to forward, return to sender." The USPS also returned the Notice sent by regular first class mail as "moved, unable to forward."

On or about January 15, 2019, Assistant Attorney General Andrew Brouwer searched the Maryland Register of Wills for an estate opened on behalf of the Respondent. The search yielded an estate opened on behalf of the Respondent on or about October 15, 2018. The search also revealed the estate's personal representative to be Thomas J. Kokolis, Esquire, 110 North Washington Street, Suite 500, Rockville, Maryland, 20850. Mr. Kokolis's attorney is listed as Jacob Deaven, Esquire, also located at 110 North Washington Street, Suite 500, Rockville, Maryland, 20850.⁵ On January 15, 2019, Mr. Brouwer sent a letter to the OAH notifying the clerk of the address of the estate's personal representative, and instructing the clerk to send notice to that address.⁶ On February 12, 2019, the OAH sent notice by first-class and certified mail (return receipt requested) to "The Estate of Duane Farley, C/O Thomas Kokkolis [sic] and Jacob Deaven, Parker, Simon & Kokkolis [sic], LLC, 110 N. Washington Street, Suite 500, Rockville, MD 20850." On February 19, 2019, the OAH received the green return receipt from the USPS, which the recipient signed on February 14, 2019.⁷ The USPS did not return the notice the OAH sent to the Rockville address by first class mail.

⁵ All information concerning Mr. Brouwer's search of the Respondent's estate and the results of that search is contained in the OAH file.

⁶ Mr. Brouwer provided an alternate address for the Respondent of P.O. Box 426, 42 Neptune Drive, Joppa, Maryland, 21085. The OAH sent notice to the Neptune Drive address, which the USPS returned as "unclaimed, unable to forward."

⁷ On January 16, 2019, the OAH sent notice to the Respondent's personal representative at the same address as the February 12, 2019 Notice. That notice concerned the original hearing date of February 12, 2019, which was cancelled due to liberal leave. The Respondent's personal representative signed for that notice on January 22, 2019.

Because someone signed for the Notice sent by certified mail on behalf of the personal representative of the Respondent's estate, I find that the Respondent received proper notice of the hearing. At no time did the Respondent, or anyone on the Respondent's behalf, request a postponement of the hearing.

Section 17-324 of the Business Occupations and Professions Article provides that before the Commission can take any final action against an individual, the individual must be personally served with a hearing notice, or the hearing notice must be sent by certified mail at least ten days prior to the hearing to the individual's last known business address. Bus. Occ. & Prof. § 17-324(d)(1). If the individual, after receiving proper notice of the hearing, fails or refuses to appear, the Commission may hear and decide the matter despite the individual's absence. *Id.* §§ 17-324(f), 17-408(c). The address used to notify the Respondent of the hearing is the address of the Respondent's personal representative, as determined by Mr. Brouwer on behalf of the MREC. I therefore find it is the Respondent's address of record with the MREC. Accordingly, I conclude that the Respondent received proper notice of the hearing, but nevertheless failed to appear. As a result, I determined that it was appropriate to proceed with the hearing despite the Respondent's failure to appear.

Legal Framework

Section 17-404(a) of the Business Occupations and Professions Article provides the criteria for a person to recover compensation from the Guaranty Fund:

(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;
 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.

The amount recovered for any claim against the Guaranty Fund “shall be restricted to the actual monetary loss incurred by the Claimants, but may not include monetary losses other than the monetary loss from the originating transaction.” COMAR 09.11.01.14. The Claimants bear the burden of proving their entitlement to recover compensation from the Guaranty Fund by a preponderance of the evidence. Bus. Occ. & Prof. § 17-407(e). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so” when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.* For the reasons articulated below, I find the Claimants satisfied their burden as to the security deposits for the properties. I do not find the Claimants satisfied their burden as to the balance of their claims.

The Merits of the Case

Arguments of the Parties

Neither the Respondent nor the Fund presented a case. The Claimants testified they entered into a property management agreement with the Respondent in 2004. That property management agreement pertained to Fleetwood Drive and Tanner Place. The Respondent, as the

Claimants' agent, entered into a lease with the Fleetwood Drive tenants and with Fletcher for Tanner Place. Fletcher and the Fleetwood Drive tenants paid security deposits per the terms of their leases, which the Respondent kept on behalf of the Claimants. In 2017, the Claimants began to experience difficulty communicating with the Respondent. Toward the end of 2017 the Claimants were uncertain how much rent the Respondent was collecting or whether the tenants for both properties were paying their rent on time. In December 2017, the Claimants learned Fletcher had not yet placed the utilities at Tanner Place in his name because they received a bill from Baltimore Gas and Electric (BGE). Fletcher took possession of Tanner Place the previous month, and the Claimants contended the Respondent was obligated to ensure Fletcher transferred the BGE bill into his name. The Claimants paid the BGE bill.

In 2018, the Claimants learned the Respondent was closing her business. In response they retained TCA Property Management (TCA) to manage the properties. TCA inspected Fleetwood Drive and discovered it was vacant. The Claimants were uncertain when the Fleetwood Drive tenants vacated that property. However, they suspected the tenants remained at Fleetwood Drive for December 2017, as well as January and February of 2018. They predicated this suspicion upon receipt of a water bill coupled with the fact the BGE bill was not transferred back to the Claimants until March of 2018.⁸ Thus, the Claimants suspected the Respondent collected rent for Fleetwood Drive for December 2017 and January and February 2018. However, the Respondent did not forward the net rent proceeds to the Claimants. The Claimants also testified that Fletcher told them he provided the Respondent with \$302.00 for pro-rated rent. However, the Respondent never forwarded any pro-rated rent to the Claimants.

⁸ The Claimants testified that when a tenant would vacate one of the properties, the BGE bill associated with that property would revert back into their name.

The Respondent never returned the security deposits provided by the Fleetwood Drive tenants or Fletcher to the Claimants. Thus, per the terms of the leases, the Claimants are liable to the Fleetwood Drive tenants and Fletcher for the return of the security deposits, if need be, out of the Claimants' own pockets.

Analysis

The Security Deposits

Paragraph 3 of the leases for the properties, entitled "Security Deposit: Payment and Receipt," contains the same boilerplate language with blanks for the parties to fill-in the amount of the security deposit. (CL Exs. 1 and 2.) The lease signed by The Fleetwood Drive tenants contains a security deposit amount of \$4,390.00. (CL. Ex. 1.) The security deposit amount on the lease Fletcher signed for Tanner Place contains a security deposit amount of \$1,295.00. (CL. Ex. 2.) Attached to both leases are security deposit receipts. The Respondent signed both security deposit receipts thus acknowledging receipt of the respective security deposits.

The Claimants testified the Respondent never returned the security deposits to them, nor provided an accounting of their use. There is no evidence in the record the Respondent returned the security deposits to the tenants. The Claimants supported their testimony by providing numerous e-mails between themselves and the Respondent. (CL. Exs. 5 and 7.) The e-mails mostly concern the Claimants' repeated attempts to obtain information from the Respondent or obtain the Respondent's cooperation in enforcing timely payment of rent by the tenants. On February 27, 2018, the Respondent sent the Claimants a letter advising them she was closing her property management business due to health concerns. (CL. Ex. 7.) The letter further advised the Respondent's business would close April 1, 2018. Thereafter the Respondent hired an accountant, John Tselepis (Mr. Tselepis), to address the concerns of her former clients. On March 29, 2018,

Mark sent an e-mail to Mr. Tselepis requesting information to “straighten out [the Claimants’] accounts and [get paid].” On April 4, 2018, Mr. Tselepis responded as follows:

I think I understand your concern. Here is the situation.

I was asked to clean up and close [the Respondent’s] real estate management company and salvage the business if possible. I was asked to make rental owner statements current, cut checks and send out. Second phase was to make copies of leases, attach security deposits and keys. I completed the final statements and checks, 3 to 4 weeks ago. [The Respondent] reviews the statements before signing and sending material. Due to health reasons she can only work 2 hours per day, 3 times per week. She will not delegate to her husband, who has authority to sign checks. The [sic] is a backlog of about 70 statements and checks. I do not have authority to sign checks.

I am scheduled to finish work on tenant documents, keys and checks for security deposits. I cannot sign the security deposits.

That is as much as I know and can do.

(*Id.*)

Maryland Real Property Article section 8-203(e)(1), entitled “Return of Security Deposit with Interest,” reads in pertinent part as follows: “Within 45 days after the end of the tenancy, the landlord shall return the security deposit to the tenant” (emphasis added).

I find by virtue of the statute, the Claimants are obligated to return the security deposits to the Fleetwood Drive tenants and Fletcher. I find the Respondent committed an act or omission by failing to return the security deposits to the Claimants. I further find the Respondent committed that act or omission through misrepresentation. Misrepresentation is defined as follows: “The act or an instance of making a false or misleading assertion about something [usually] with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.” *Black’s Law Dictionary* 1198 (11th ed. 2019).

Both leases identify the Respondent as the Claimants’ listing broker or agent. Thus, I find the Respondent was acting as a fiduciary on behalf of the Claimants and thus had a duty to return

the security deposits upon the Claimants' request. The Respondent failed to return the security deposits to the Claimants when requested (despite having the ability to do so per the e-mail from Mr. Tselepis). Thus, I find the Claimants are entitled to reimbursement from the fund of \$5,685.00,⁹ representing the principal amount¹⁰ of the security deposits.

Rent Payments Not Received

The Claimants argued they should be reimbursed for rent collected but not paid on Fleetwood Drive for December 2017 and January and February of 2018 (Fleetwood rent claim). They also argued they should be reimbursed for \$302.00 of pro-rated rent Fletcher claimed he paid the Respondent (Tanner rent claim). On both these issues I do not find the Claimants met their burden and shall decline to recommend an award.

With regard to the Fleetwood rent claim, the Claimants presented no evidence the Respondent actually collected rent from the Fleetwood Drive tenants during those months. Moreover, there is no concrete proof the Fleetwood Drive tenants still resided at the property during the December 2017 and January and February 2018 timeframe. The Claimants can only speculate the Fleetwood Drive tenants resided there, because BGE did not begin sending the Claimants bills for that property until March 2018. Because the Claimants provided no proof the Respondent actually collected rent for those months, I cannot find they incurred an actual loss as required to qualify for reimbursement from the Fund. Additionally, even if the Claimants had provided proof the Respondent collected the Fleetwood rents, there is no Property Management Agreement in evidence to guide me as to what the Claimants are entitled.¹¹

⁹ \$4,390.00 (security deposit for Fleetwood Drive) plus \$1,295.00 (security deposit for Tanner Place) = \$5,685.00.

¹⁰ The Claimants did not make a claim for interest.

¹¹ The Claimants entered "CL Ex. 4" into evidence and identified it as the Property Management Agreement. However, the documents contained in that exhibit appear to only be some informational documents. The exhibit does not contain a signed agreement.

For the same reason, I cannot recommend an award for the Tanner rent claim. Without knowing the terms of the Property Management Agreement, I have no way of knowing to what amount of the \$302.00 pro-rated rent the Claimants are entitled.¹² Moreover, the Claimants only presented Fletcher's statement that the Respondent received that amount and provided no evidence of any deposits or checks in that amount.

PROPOSED CONCLUSIONS OF LAW

Based on the Findings of Fact and Discussion, I conclude that the Claimants have established by a preponderance of the evidence that they sustained an actual loss compensable by the Guaranty Fund resulting from the Respondent's act or omission in providing real estate brokerage services that constitutes misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2) (2018).

I further conclude as a matter of law that the amount of the award the Claimants are entitled to receive from the Fund is \$5,685.00. Md. Code Ann., Bus. Occ. § 17-404(b) (2018); COMAR 09.11.01.14.

RECOMMENDED ORDER

I **PROPOSE** that the Claim filed by the Claimants against the Maryland Real Estate Commission Guaranty Fund be **GRANTED** in the amount of \$5,685.00;

I further **PROPOSE** that the Maryland Real Estate Commission Guaranty Fund pay to the Claimants their actual monetary loss in the amount of \$5,685.00 for the Respondent's wrongful acts and omissions;

¹² Although not formally part of their claim, as another example, Precious testified that she and Mark incurred a Homeowners Association (HOA) charge on Tanner Place, which the Respondent should have addressed. Without knowing the Respondent's obligations under the Property Management Agreement with regard to HOA charges, I cannot find the Respondent committed any act or omission.

I further **PROPOSE** that the Respondent shall 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 pursuant to section 17-411(a) of the Business Occupations and Professions Article of the Maryland Annotated Code; and

I further **PROPOSE** that the Commission's records and publications reflect this proposed decision.

June 26, 2019
Date Decision Issued

SIGNATURE ON FILE

Nicolas Orechwa
Administrative Law Judge

NO/sw
#180613