

**BEFORE THE MARYLAND REAL ESTATE COMMISSION**

**IN THE MATTER OF THE CLAIM  
OF KATHRYN AULT,**

**Claimant**

v.

**THE MARYLAND REAL ESTATE  
COMMISSION GUARANTY FUND  
FOR THE ALLEGED MISCONDUCT  
OF NATALIE DIFRANCESCO,**

**Respondent**

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**CASE NO. 2016-RE-509**

**OAH NO. DLR-REC-22-18-24211**

**PROPOSED ORDER**

The Findings of Fact, Proposed Conclusions of Law and Recommended Order of the Administrative Law Judge dated February 25, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 27 day of March, 2019 .

**ORDERED,**

- A. That the Findings of Fact in the proposed decision be, and hereby are, **ADOPTED**.
- B. That the Proposed Conclusions of Law in the proposed decision be, and hereby are,

**ADOPTED** in part and **AMENDED** in part as follows:

*Change No. 1.* The citation to Md. Code Ann., Bus. Occ. & Prof. §17-404(a)(2)(iii)(1)(2018) should instead be to Md. Code Ann., Bus. Occ. & Prof. §17-404(a)(2)(iii)(2)(2018).

- C. That the Recommended Order in the proposed decision be, and hereby is,

**ADOPTED** in part and **AMENDED** in part as follows:

**ORDERED** that the Claimant, Kathryn Ault, be reimbursed from the Maryland Real Estate Guaranty Fund in the amount of **Six Thousand Two Hundred Nineteen Dollars (\$6,219.00)**;

**ORDERED** that all real estate licenses held by the Respondent, Natalie DiFrancesco, shall be suspended until the Maryland Real Estate Guaranty Fund is reimbursed, including any interest that is payable under the law; and

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

D. Pursuant to Annotated Code of Maryland, State Government Article § 10-220, the Commission finds that the Proposed Decision of the Administrative Law Judge required modification because (1) a statutory reference in the Proposed Conclusions of Law required correction, (2) it omitted from the Recommended Order suspension of all licenses held by the Respondent until the Maryland Real Estate Guaranty Fund is reimbursed, and (3) it omitted an order requiring the records and publications of the Maryland Real Estate Commission 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 exceptions and 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.

MARYLAND STATE REAL ESTATE  
COMMISSION

27 March 2019  
Date

By:

**SIGNATURE ON FILE**

Anne S. Cooke

IN THE MATTER OF THE CLAIM  
OF KATHRYN AULT,  
CLAIMANT

v.

THE MARYLAND REAL ESTATE  
COMMISSION GUARANTY FUND  
FOR THE ALLEGED MISCONDUCT  
OF NATALIE DIFRANCESCO,  
RESPONDENT

\* BEFORE DEBORAH S. RICHARDSON,  
\* ADMINISTRATIVE LAW JUDGE,  
\* THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
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\*  
\* OAH No.: DLR-REC-22-18-24211  
\* MREC COMPLAINT No.: 16-RE-509

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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On April 13, 2016, Kathryn Ault (Claimant)<sup>1</sup> filed a claim against the Maryland Real Estate Commission (REC) Guaranty Fund (Fund) for \$40,000.00 for monetary losses allegedly incurred by the Claimant as a result of the misconduct of Natalie DiFrancesco, licensed real estate salesperson (Respondent), in acting as the listing agent for the sale of the property located at 129 North Linwood Avenue in Baltimore, Maryland (Property).<sup>2</sup>

<sup>1</sup> At the time of the hearing, the Claimant had married and changed her last name to Ault-Mullane.

<sup>2</sup> The Claimant also included the name David Tobash as a Respondent on the claim she filed with the REC. The REC did not include this name in its transmittal to the OAH; the case was captioned and notice sent only to Ms. DiFrancesco; and the Claimant did not object that Mr. Tobash was not included as a Respondent before me.

On July 20, 2018, the REC issued an Order for Guaranty Fund Hearing and transmitted the matter to the Office of Administrative Hearings (OAH) for a hearing on the Claimant's claim against the Fund.

On November 28, 2018, I conducted a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2018). The Claimant was present and represented herself. Nicholas Sokolow, Assistant Attorney General for the Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Respondent was also present and represented herself.

The Administrative Procedure Act, the procedural regulations of the DLLR, 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**

The issues are whether the Claimant sustained an actual loss as a result of an act or omission of the Respondent that constitutes theft, embezzlement, false pretenses, forgery, misrepresentation, or fraud; and, if so, the amount of the loss.

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

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

- Clt. Ex. 1. Zillow listing, printed March 30, 2016; Metropolitan Regional Information Systems listing, undated; Long & Foster listing, printed September 5, 2018
- Clt. Ex. 2. Addendum to Sales Contract, March 17, 2015
- Clt. Ex. 3. Email chain beginning from Caitlin Audette to Claimant, March 28, 2016; Email chain beginning from Emily Sherman to Claimant, March 15, 2016

- Cl. Ex. 4. Commission for Historical and Architectural Preservation credit spreadsheet, undated; Vacant dwelling spreadsheet, undated; Real property tax bills, dates ranging from July 1, 2015 to June 30, 2018

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

- GF Ex. 1. Notice of hearing, August 30, 2018
- GF Ex. 2. Transmittal and Order for Guaranty Fund Hearing, July 20, 2018
- GF Ex. 3. The Respondent's licensing history with the REC, printed November 28, 2018
- GF Ex. 4. REC Complaint Form, April 13, 2016

The Respondent did not offer any exhibits for admission into evidence.

### Testimony

The Claimant testified in her own behalf.

The Fund presented no evidence.

The Respondent testified in her own behalf.

### **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 salesperson.
2. A Commission for Historical and Architectural Preservation (CHAP) tax credit is a ten year tax credit available in Baltimore City for renovated historic properties. Baltimore City also has some five year tax credits, including Vacants to Values and Newly Constructed Dwelling tax credits.
3. David Tobash (Seller) was the Owner and Seller of the Property at 129 North Linwood Avenue, Baltimore, MD, 21224.
4. At all times relevant to this case, the Respondent was the Seller's girlfriend.

5. Before listing the Property for sale, the Seller told the Respondent the Property would either have a ten year CHAP credit or one of the five year tax credits.

6. In February 2015, a representative from Baltimore City informed the Seller that as he had started renovation work on the Property before receiving preliminary approval, his application for the CHAP credit had been revoked. The Respondent was unaware of this fact and did not learn the application for the CHAP credit had been revoked until the hearing.

7. The Seller listed the Property for sale in March 2015. The Respondent was the listing agent.

8. The Respondent did not prepare the Zillow real estate listing for the Property.

9. The Claimant did not view the Long and Foster real estate listing for the Property.

10. The Claimant viewed the Metropolitan Regional Information Systems (MRIS) listing for the Property when she was shopping. The Respondent drafted the MRIS listing for the Property. Under remarks, the MRIS listing stated "Beautiful ENERGY EFFICIENT rehab w/PARKING PAD & TAX CREDIT!" (Clmt. Ex. 1).

11. On March 17, 2015, the Claimant entered into a contract with the Seller to purchase the Property for \$259,000.00.

12. On March 18, 2015, the Claimant signed an Addendum to Sales Contract, which had been signed by the Seller on March 17, 2015. The Addendum to Sales Contract stated "The property at 129 N. Linwood Ave., Baltimore, MD 21224 is eligible for a tax incentive of either Vacants to Values or CHAPs Historic Tax Credit." (Clmt. Ex. 2).

13. After the parties entered into the contract, the Claimant went to the Property with her realtor. The Respondent, who was at the Property with the Seller, asked her if she knew the Property had a tax credit.

14. Between the time of the contract and the closing, the Respondent learned the CHAP credit had not been approved on the Property. The Respondent believed, based on information she received from the Seller, that the Claimant was still eligible for a five year tax credit.

15. A few days before closing, the Claimant's realtor told the Claimant the CHAP credit had not been approved, there was an appeal pending regarding the CHAP credit, but that she was assured to receive one of the five year tax credits. The Claimant's realtor had received this information from the Respondent.

16. The parties closed on the Property on May 5, 2015.

17. At closing, the Claimant was provided with paperwork to apply for the five year tax credits as this was not something that had to be done by the Claimant and not by the Seller.

18. In September 2015, the Claimant was contacted by someone who had represented the Seller on tax issues and told that the appeal of the CHAP credit had been denied on the Property. The Claimant was told how to apply for the five year tax credits.

19. The Claimant applied for the five year tax credits.

20. Baltimore City denied the Claimant's applications for the five year tax credits because the Property was not newly constructed and had never been cited as a vacant building.

21. The Claimant's realtor called the Respondent and informed her the Claimant had been denied the five year tax credits because the Property had not been declared vacant before the sale. The Respondent informed the Claimant's realtor the Seller would be able to provide an affidavit from the fire department stating the Property had been vacant before the sale.

22. The Claimant sold the Property on May 1, 2018.

23. The Respondent did not, prior to the closing, verify with the City of Baltimore the Property's eligibility for any tax credits.

24. The Claimant suffered an actual loss of \$6,219.00.

## DISCUSSION

### **Applicable law**

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 and 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.
- (c)(1) A person may not recover from the Guaranty Fund for any loss that relates to:
  - (i) the purchase of any interest in a limited partnership that is formed for the purpose of investment in real estate;
  - (ii) a joint venture that is promoted by a licensed real estate broker, a licensed associate real estate broker, or licensed real estate salesperson for the purpose of investment in real estate by 2 or more individuals; or
  - (iii) the purchase of commercial paper that is secured by real estate.
- (2) A claim under the Guaranty Fund may not be made by:
  - (i) the spouse of the licensee or the unlicensed employee alleged to be responsible for the act or omission giving rise to the claim; or
  - (ii) the personal representative of the spouse of the licensee or the unlicensed employee alleged to be responsible for the act or omission giving rise to the claim.



(d) A claim under this subtitle shall be submitted to the Commission within 3 years after the claimant discovers or, by the exercise of ordinary diligence, should have discovered the loss or damage.

Md. Code Ann., Bus. Occ. & Prof. § 17-404 (2018). *See also* COMAR 09.11.01.14.

**The merits of the claim**

The Claimant alleges the Respondent obtained money from the Claimant in the sale of the Property by virtue of fraud or misrepresentation. Specifically, the Claimant alleges having a tax credit on the Property was of the utmost importance to her, as it was the only way it brought the Property within her budget. She recognizes she was told before closing that the ten year CHAP credit was no longer a possibility, but claims the Respondent represented one of the five year tax credits would apply. In fact, the Respondent testified at the hearing she told the Claimant one of the five year tax credits was “guaranteed.”

Although “fraud” and “misrepresentation” are both acts that may support a claim in this case, these terms are not defined in the Business and Professions Article of the Maryland Code. Fraud, also known as deceit, is defined elsewhere:

To recover damages for deceit, it must be shown that:

- (1) the defendant made a false representation of a material fact;
- (2) the defendant knew of its falsity or made it with such reckless indifference to the truth that it would be reasonable to charge the defendant with knowledge of its falsity;
- (3) the defendant intended that the plaintiff would act in reliance on such statements;
- (4) plaintiff did justifiably rely on the representations of the defendant; and
- (5) plaintiff suffered damages as a result of that reliance.

Maryland Pattern Jury Instructions (MPJI)-Cv 11:1.

The elements of false representations are as follows:

A false representation is a statement, conduct, or act by which one intentionally misleads another person about a material fact.

A statement of opinion, judgment, prediction of a future event, or promise may constitute false representation of a material fact.

A promise to do something may be a false representation if the person did not intend to do the promised act when the promise was made.

MPJI-Cv 11:3.

Material fact is defined as:

A fact is material if under the circumstances a reasonable person would rely upon it in making his or her decision.

A fact may also be material, even though a reasonable person might not regard it as important, if the person stating or concealing it knows that the person with whom he or she is dealing probably will use the fact in determining his or her course of action.

MPJI-Cv 11:4.

There is no doubt the Property's eligibility for a five year tax credit was a material fact.

The Respondent knew buyers in general care about the existence of these tax credits – that is why she advertised the Property with a tax credit. Moreover, after the Claimant entered into a contract but before closing, the Respondent reiterated to the Claimant the existence of the tax credit. Moreover, the Claimant testified convincingly, and at great length, that only with the tax credit was the Property in a range within her budget.

To constitute fraud, I must find the Respondent made a false representation about this material fact. To constitute a false statement, I must find the Respondent knew of its falsity or made the statement with such reckless indifference to the truth it is reasonable to charge the Respondent with knowledge of its falsity. I believe the Respondent when she testified she was entirely unaware the ten year CHAP credit application had been revoked even before she listed

the Property for sale. When the Claimant confronted her with emails from Baltimore City representatives at the hearing, it was plain the Respondent was shocked.

However, the Claimant was informed the ten year tax credit was off the table even before closing, and therefore cannot form the basis for this misrepresentation claim. Only the issue of the five year tax credit remains. After the contract, but before the closing, the Respondent learned from the Seller, her boyfriend, that the ten year credit was no longer going to happen. At the same time, she was assured by him the five year credit was still viable. The question then becomes, did the Respondent know the five year credit was not viable, or should she have known?

In answering this question, I am guided by the code of ethics which governs the Respondent with respect to her dealings with the public:

***A. The licensee shall remain informed of matters affecting real estate in the community, the State, and the nation.***

B. The licensee shall be informed on current market conditions in order to be in a position to advise clients as to the fair market price.

***C. The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field.***  
The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.

***D. The licensee shall make a reasonable effort to ascertain all material facts concerning every property for which the licensee accepts the agency, in order to fulfill the obligation to avoid error, exaggeration, misrepresentation, or concealment of material facts.***

E. The licensee, acting as agent, may not discriminate in the sale, rental, leasing, trading, or transferring of property to any person or group of persons in violation of State Government Article, §20-402, Annotated Code of Maryland.

F. The licensee may not be a party to the naming of a false consideration in any document.

G. Advertisement.

(1) The licensee in advertising shall be especially careful to present a true picture. A broker may not advertise without disclosing the broker's name or the company name as it appears on the license. A broker may not permit associate brokers or salespersons to use individual names unless the connection with the broker is obvious in the advertisement.

(2) Effective October 1, 2004, an associate broker or salesperson may not use an individual telephone number or email address in an advertisement, as defined in Business Occupations and Professions Article, §17-527.2(a)(3), Annotated Code of Maryland, unless the identified telephone number of the broker or branch office manager also appears in the advertisement.

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.

I. All real estate documents shall be signed by a licensee in the licensee's own name, and may not be signed in the name of a group or team.

COMAR 09.11.02.01 (emphasis added).

This code of conduct puts certain obligations on the Respondent beyond merely gathering information from her client. She has a duty to protect the public against misrepresentations and to make a "reasonable effort" to ascertain all material facts about the Property. Once the Respondent learned there was a problem with the ten year tax credit, she was on notice to do a more thorough investigation into the five year tax credit as opposed to simply relying on the word of the Seller. Instead, she allowed the Claimant to proceed to closing based on her belief the five year tax credit was "guaranteed," a word used by the Respondent.

The Respondent argued at the hearing the Property was still eligible for a five year tax credit. She testified the Seller was willing to obtain an affidavit from the fire marshal stating the Property has been vacant for over a year prior to the sale. The Claimant provided documentary

evidence showing the Property had been rejected for both five year tax credits. Moreover, she testified she spoke to Baltimore City officials who informed her an affidavit would not suffice, as the Property had to have been declared vacant prior to the renovation. The Claimant has established, by a preponderance of the evidence, that the Property was not eligible for the five year tax credit, and the Respondent made a material representation to the Claimant with knowledge it was a material inducement to purchase, and made the representation with reckless indifference, relying only on her boyfriend, who also had motive to complete the sale. The Respondent had the ability, and under the Code of Ethics the responsibility, to inquire of City officials whether the property would qualify for tax credits, and did not do so. Thus, she is charged with knowledge of the falsity, whether or not she had actual knowledge.

Having found the Respondent made a false representation about a material fact during the sale of this Property, I must determine the amount of the loss. On this issue the Claimant provided detailed evidence. Claimant's exhibit four includes the tax bills incurred and paid by the Claimant during the three years she owned the Property. She also provided a spreadsheet which details the assessment on the Property before the improvement, which was \$85,000.00, and the assessed value after the improvement, subject to a twenty percent deduction each year, which potentially could have gone on for five years. The Claimant was not eligible for a tax credit in 2016 because the sale occurred after the application deadline. Moreover, the Claimant acknowledged she only owned the property for ten of the twelve months in the 2018 tax year. Using these figures, the Claimant showed the cumulative total for the tax credit she could have received for tax years 2017 and 2018 was \$6,219.00. The Respondent provided no evidence to contradict these figures and the Fund did not disagree with the Claimant's calculations. Therefore I find by a preponderance of the evidence the Claimant has proven an actual loss of \$6,219.00.

**PROPOSED 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 or property was obtained from the Claimant by fraud or misrepresentation in the provision of real estate services. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(iii)(1) (2018).

I further conclude as a matter of law that the amount of the award the Claimant is entitled to receive from the Fund is \$6,219.00. Md. Code Ann., Bus. Occ. § 17-404(b) (2018); COMAR 09.11.01.14.

I further conclude as a matter of law that the Real Estate Commission should suspend the license of the Respondent until she repays the Guaranty Fund the amount paid to the Claimant with respect to this case. Md. Code Ann., Bus. Occ. § 17-412 (2018).

**PROPOSED ORDER**

I **PROPOSE** that the Claim filed by the Claimant against the Maryland Real Estate Guaranty Fund be **GRANTED** in the amount of \$6,219.00.

February 25, 2019  
Date Decision Issued

**SIGNATURE ON FILE**

Deborah S. Richardson  
Administrative Law Judge

DSR/cmj  
# 177865