

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**IN THE MATTER OF THE CLAIM
OF JOHN & PHILLIP SOLOMOND**

CLAIMANTS,

v.

**THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND
FOR THE ALLEGED MISCONDUCT
OF DASHEENA DRAKE,**

RESPONDENT

CASE No. 598-RE-2019

OAH No. LABOR-REC-22-21-25132

* * * * *

PROPOSED ORDER

The Proposed Findings of Fact, Proposed Conclusions of Law and Recommended Order of the Administrative Law Judge dated March 16, 2022, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 25th day of April, 2022, hereby

ORDERED:

- A. That the Proposed Findings of Fact in the recommended decision be, and hereby are, **AFFIRMED.**
- B. That the Proposed 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.**
- D. That the records, files, and documents 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 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.

F. Once this 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

4/25/2022
Date

By:

SIGNATURE ON FILE

<p>IN THE MATTER OF THE CLAIM</p> <p>OF JOHN & PHILLIP SOLOMOND,</p> <p>CLAIMANTS,</p> <p>v.</p> <p>THE MARYLAND REAL ESTATE</p> <p>COMMISSION GUARANTY FUND,</p> <p>FOR THE ALLEGED MISCONDUCT</p> <p>OF DASHEENA DRAKE,</p> <p>RESPONDENT</p>	<p>* BEFORE BRIAN PATRICK WEEKS,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH CASE No.: LABOR-REC-22-21-25132</p> <p>* REC No.: 2019-RE-598</p> <p>* *</p>
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RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUES
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STATEMENT OF THE CASE

On April 2, 2019, John & Phillip Solomond (Claimants) filed a claim against the Maryland Real Estate Commission Guaranty Fund (the Fund) for \$8,043.50. Md. Code Ann., Bus. Occ. & Prof. § 17-406 (2018).¹ The claim was for monetary losses allegedly incurred by the Claimants due to the misconduct of Dasheena Drake (Respondent), relating to the management of two apartments located at a property in Baltimore City. On November 1, 2021, the Maryland Real Estate Commission (MREC) transmitted the matter to the Office of

¹ All references to the Business Occupations & Professions Article are to the 2018 volume.

Administrative Hearings (OAH) for a hearing concerning the Claimant's claim against the Fund. Bus. Occ. & Prof. § 17-407(c)(2)(ii).

On January 28, 2022, I held a video hearing from the OAH in Hunt Valley, Maryland; the parties participated from their respective locations. Bus. Occ. & Prof. § 17-408; Code of Maryland Regulations (COMAR) 28.02.01.20B(1). John Solomond was present for the Claimants. The Respondent was present and represented herself. Eric London, Assistant Attorney General for the Department of Labor (Department), represented the Fund.

The Administrative Procedure Act, the procedural regulations of the Department and the OAH Rules of Procedure govern this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 09.01.02, 09.01.03, 09.11.03.02; and 28.02.01.

ISSUES

(1) Did the Claimants 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?

(2) If the Claimants sustained an actual loss, what is the amount of actual loss compensable by the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted into evidence the following exhibits offered by the Claimants, unless otherwise noted:

Cl. Ex. 1 - Jonathan Gross Lease Agreement with addenda, various dates

Cl. Ex. 2 - Letter from John Solomond to Director of Strong City Baltimore, Inc., November 9, 2021
Email from John Solomond to Dylan McDonough, November 9, 2021
Checks, February 6 and March 26, 2019

- Cl. Ex. 3 - Transcript of text messages between John Solomond and the Respondent, various dates
- Cl. Ex. 4 - *Not admitted*
- Cl. Ex. 5 - Judgment, District Court of Maryland for Baltimore City, Case No. 01-01-0007239-2019
- Cl. Ex. 6 - Rodney Joyner Lease Agreement, signed April 5, 2018

I admitted into evidence the following exhibits offered by the Respondent:

- Resp. Ex. 1 - Emails between the Respondent and Vivian Feen, various dates
- Resp. Ex. 2 - Sprint phone records for DeeVine Properties, bill date April 4, 2018
- Resp. Ex. 3 - Text messages between the Respondent and John Solomond, various dates
- Resp. Ex. 4 - Emails between John Solomond and Mr. McDonough, April 5, 2019
- Resp. Ex. 5 - Check, February 15, 2019
- Resp. Ex. 6 - Picture of Wells Fargo statement for February 6-28, 2019, printed January 28, 2022

I admitted into evidence the following exhibits offered by the Fund:

- Fund Ex. 1 - Hearing Notice, November 5, 2021
- Fund Ex. 2 - Order for Hearing, December 20, 2021
- Fund Ex. 3 - Respondent's License Registration, last updated September 28, 2021
- Fund Ex. 4 - MREC Complaint and Guaranty Fund Claim, filed by the Claimant, April 2, 2019

Testimony

John Solomond testified on the Claimants' behalf. The Respondent testified on her behalf. The Fund did not offer any testimony.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to this matter, the Respondent was a licensed real estate salesperson. She provided property management services through her company, DeeVine Properties (DeeVine).
2. The Claimants, through Maine Ave Property Holdings, LLC, own a property at 3921 Maine Avenue in Baltimore, Maryland. The property has multiple rental apartments.
3. On March 7, 2018, the Respondent emailed the Claimants' listing agent, Vivian Feen, on behalf of Mr. Joyner, a prospective tenant, regarding a listing for an apartment at 3921 Maine Avenue and wrote that "I have a Gentleman . . . that fits your . . . criteria." (Resp. Ex. 1). The Respondent wrote that Mr. Joyner "will be receiving assistance from a Veteran Assistance program. They will pay his security deposit and 1st month's rent." *Id.* The Respondent inquired, "Do you think your client will work with this tenant[?]" *Id.*
4. On March 11, 2018, Ms. Feen emailed the Respondent to ask about a previous judgment against Mr. Joyner for \$7,084.00 in back rent. Ms. Feen wrote the Respondent that Mr. Joyner would probably have to pay a security deposit of two months' rent. The Respondent wrote back the following day that the security deposit amount would be fine. Later that day, the Claimants approved Mr. Joyner to be a tenant and Ms. Feen emailed the Respondent to inform her.
5. The Respondent and John Solomond first spoke by phone regarding Mr. Joyner on March 16, 2018.
6. On or about April 7, 2018, Mr. Joyner executed a lease to reside at an apartment at 3921 Maine Avenue. The listing real estate broker and landlord agent for the apartment was Ms. Feen. The Respondent acted as the exclusive tenant agent for Mr. Joyner.

7. On or about January 28, 2019, Mr. Gross executed a lease to reside at a different apartment at 3921 Maine Avenue. The lease required Mr. Gross to pay a security deposit of \$1,700.00, pro rata monthly rent for January 25-31, 2019 in the amount of \$192.00, and monthly rent of \$850.00.

8. On or about January 24, 2019, Strong City Baltimore, Inc. (Strong City) sent a check for \$2,550.00 on behalf of Mr. Gross to DeeVine. The check included a security deposit equal to two months' rent, and the monthly rent for February. DeeVine cashed the check on an unspecified date. The check did not include the pro rata monthly rental amount of \$192.00 for January 25-31, 2019.

9. The Respondent sent a check to John Solomond on an unspecified date in February 2019. The check covered the security deposit of \$1,700.00, but not the pro rata amount of \$192.00 for January 25-31, 2019. The Respondent withheld \$850.00 as her agreed-upon fee for assisting the Claimants.

10. On or about March 7, 2019, Strong City sent a check for \$1,007.66 on behalf of Mr. Gross to DeeVine. The check included the March 2019 rent and the pro rata rent from January 2019. DeeVine cashed the check on March 26, 2019.

11. On or about June 19, 2019, John Solomond obtained a default judgment against Mr. Joyner for \$6,175.00 in the District Court of Maryland for Baltimore City. The \$6,175.00 represented unpaid rent and utilities for the last seven months of Mr. Joyner's tenancy.

DISCUSSION

I. 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." Bus. Occ. & Prof. § 17-407(e). Section 17-404(a) governs

claims brought against the Fund and sets forth, in pertinent part, 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.

Bus. Occ. & Prof. § 17-404(a), (b); *see* COMAR 09.11.01.14.

II. Analysis

The claim involves a transaction that relates to real estate that is located in the State and involves an act or omission by a licensed real estate salesperson. The property is located in Baltimore, Maryland, and the Respondent was a licensed real estate salesperson at all times relevant to the claim. Further, the alleged act occurred in the provision of real estate brokerage services because the definition of “provide real estate brokerage services” includes “for consideration . . . leasing any real estate,” “for consideration . . . collecting rent for the use of any real estate,” and “for consideration, assisting another person to . . . lease any residential real estate.” Bus. Occ. & Prof. § 17-101(l)(1)(i), (1)(ii), (2). The Respondent obtained remuneration from the Claimants for assisting with leasing the Claimants’ apartments and, in Mr. Gross’s case, collecting rent. Therefore, the Claimants have satisfied the first two requirements of Section 17-404(a)(2) of the Business Occupations & Professions Article.

The dispositive question, then, is whether the Respondent committed an act or omission in which she obtained money or property from the Claimant by theft, embezzlement, false pretenses, or forgery; or that constitutes fraud or misrepresentation. Bus. Occ. & Prof. § 17-404(a)(2)(iii). The Claimants argued that the Respondent obtained money from them by cashing Mr. Gross's rent checks and then failed to send the rent to them. The Claimants argued also that the Respondent misrepresented the source of Mr. Joyner's rent payments. For the reasons set forth below, I conclude that the Claimants have met their burden of proof with respect to Mr. Gross and can recover from the Guaranty Fund for the portion of Mr. Gross's rent that the Respondent owes to the Claimants. I further conclude that the Respondent did not misrepresent the source of Mr. Joyner's rent payments.

a. Mr. Gross's Tenancy

There is no written agreement between the Claimants and the Respondent in the record, which makes it difficult to establish the exact contours of their business relationship. It appears that the Respondent helped to identify Mr. Gross as a prospective tenant in conjunction with a housing program.² (Resp. Ex. 3). It appears that the Respondent also assisted with inspections for the apartment and ensured that the Claimants received the executed lease. *Id.* The Claimants and the Respondent agreed that she would receive a commission equal to one month's rent, equal to \$850.00, for her work on behalf of the Claimants with respect to Mr. Gross. *Id.*

The Respondent received and cashed two checks sent on behalf of Mr. Gross for rent owed to the Claimants. On January 24, 2019, Strong City paid \$2,550.00 to DeeVine. At the hearing, John Solomond stated that he did not receive any of this money. The documentary evidence shows otherwise. On February 15, 2019, the Respondent made out a check to Maine Ave. Holdings, LLC, the Claimants' company. (Resp. Ex. 5). The Respondent also submitted a

² The program appears to be a rapid re-housing program provided through an organization called Youth Empowered Society. *See* Resp. Ex. 4.

bank statement showing that the check was cashed on February 15, 2019. (Resp. Ex. 6). Additionally, the Respondent submitted text messages from John Solomond in which he confirmed receipt of the security deposit, which in Mr. Gross's case was two months of rent, or \$850.00 x 2 (\$1,700.00). (Resp. Ex. 3). Therefore, I find that the Respondent received \$2,550.00 from Strong City, deducted her agreed-upon commission of one month's rent of \$850.00, and then paid the Claimants the remaining balance of \$1,700.00.

On March 7, 2019, Strong City paid \$1,077.66 to DeeVine.³ The question is whether the Respondent ever sent a check to the Claimants for \$1,077.66. I conclude that it is more likely than not that the Respondent failed to send a check for \$1,077.66 to the Claimants, and explain below.

The Respondent testified that she sent a check to the Claimants on two occasions but that the Claimants never cashed either check. However, she did not provide any documentation to corroborate her testimony. Further, the evidence in the record supports a finding that she did not send a check to the Claimants. The Respondent submitted a complete copy of all texts between her and John Solomond. *See* Resp. Ex. 3. The last text from the Respondent is from March 26, 2019, and she wrote that "[the check] hasn't been deposited as of yet." *Id.* Further, in an email exchange from April 5, 2019, Strong City confirmed that the Respondent had cashed the check on March 26, 2019, and John Solomond wrote that he never received any proceeds from the \$1,077.66 check. (Resp. Ex. 4). The Respondent's inability to produce documentary evidence showing that she sent the \$1,077.66 check to the Claimants and lack of details in her testimony

³ This amount represents the pro rata January 2019 rent and the March 2019 rent.

regarding how the check was transmitted to the Claimants lead to a finding that she did not send a \$1,077.66 check to the Claimants.⁴

A claimant may recover from the Fund for an act or omission in which money or property is obtained from a person by embezzlement. Bus. Occ. & Prof. § 17-404(a)(2)(iii)(1).

Embezzlement is a statutory offense in Maryland and part of the State's consolidated theft statute. *Counts v. State*, 444 Md. 52, 58-59 (2015). There is a separate statutory crime for embezzlement – fraudulent misappropriation by a fiduciary. Md. Code Ann., Crim. Law § 7-113 (2021). The relevant statutory section states:

(a) A fiduciary may not:

(1) fraudulently and willfully appropriate money or a thing of value that the fiduciary holds in a fiduciary capacity contrary to the requirements of the fiduciary's trust responsibility; or

(2) secrete money or a thing of value that the fiduciary holds in a fiduciary capacity with a fraudulent intent to use the money or thing of value contrary to the requirements of the fiduciary's trust responsibility.

Id.

As noted above, the exact business relationship between the Claimants and the Respondent is less than clear. However, the Respondent became a fiduciary for the Claimants' property when she accepted and deposited the checks from Strong City for rent owed to the Claimants. (Cl. Ex. 1). The Claimants proved that the Respondent fraudulently and willfully appropriated the \$1,077.66 check. Accordingly, the Claimants may recover from the Fund on the basis that the Respondent, their fiduciary, obtained the \$1,077.66 check from them by embezzlement when she fraudulently misappropriated the rent due to the Claimants. Crim. Law § 7-113.

⁴ This conclusion is further buttressed by the fact that, in contrast to the \$1,700.00 check, the Claimants never acknowledged receipt of the \$1,077.66 check and specified in the claim form that the Respondent had withheld the pro rata January and March 2019 rent.

b. Mr. Joyner's Tenancy

The Claimants argued that the Respondent misrepresented that the source of Mr. Joyner's rent payments would be the Veterans Affairs (VA) program.⁵ The Respondent denied having made any statement regarding the source of Mr. Joyner's monthly rent payments and noted that she did not represent the Claimants in the transaction. I conclude that the Respondent did not misrepresent the source of Mr. Joyner's rent payments. Accordingly, the Claimants cannot recover from the Fund for any losses attributable to Mr. Joyner's failure to pay rent.

Misrepresentation may either be fraudulent or negligent. *Cooper v. Berkshire Life Ins. Co.*, 148 Md. App. 41, 56-58 (2002). To sustain an action for fraudulent misrepresentation, the plaintiff must prove:

- (1) that the representation made is false; (2) that its falsity was either known to the speaker, or the misrepresentation was made with such a reckless indifference to truth as to be equivalent to actual knowledge; (3) that it was made for the purpose of defrauding the person claiming to be injured thereby; (4) that such person not only relied upon the misrepresentation, but had a right to rely upon it in the full belief of its truth, and that he would not have done the thing from which the injury resulted had not such misrepresentation been made; and (5) that he actually suffered damage directly resulting from such fraudulent misrepresentation.

Id. at 56-57 (citations omitted). To sustain an action for negligent misrepresentation, the plaintiff must prove:

- (1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
- (2) the defendant intends that his statement will be acted upon by the plaintiff;
- (3) the defendant has the knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
- (4) the plaintiff, justifiably, takes action in reliance on the statement; and
- (5) the plaintiff suffers damage proximately caused by the defendant's negligence.

Id. at 57 (citations omitted).

⁵ The Claimants wrote on the claim form that the Respondent failed to do a thorough background on Mr. Joyner, but did not advance this argument at the hearing. As such, I consider it waived and will not address it.

As explained further below, the Claimants have not proven by a preponderance of the evidence that the Respondent made any representation other than the statement in her email that a Veteran Assistance program⁶ would pay Mr. Joyner's security deposit and first month's rent. That representation was not shown to be false.

On March 7, 2018, the Respondent emailed Ms. Feen, the Claimants' listing agent for an apartment at 3921 Maine Avenue, and wrote that "I have a Gentleman seeking a 1 bedroom unit that fits your listings criteria." (Resp. Ex. 1). She further wrote, "He will be receiving assistance from a Veteran Assistance program. They will pay his security deposit and 1st month's rent." *Id.* She alerted Ms. Feen to the fact that Mr. Joyner had low credit scores and sent Ms. Feen his credit report. *Id.* Ms. Feen then requested that Mr. Joyner fill out an application. *Id.* Ms. Feen wrote that Mr. Joyner would be required to pay two months' rent as a security deposit. *Id.* On March 12, 2018, Ms. Feen wrote the Respondent that the Claimants had approved Mr. Joyner's application. *Id.*

The Claimants wrote in their claim form that "damages from lost rent are n (sic) excess of \$6995." (Fund Ex. 4). To substantiate this amount, John Solomond submitted a June 19, 2019 default judgment from the District Court of Maryland for Baltimore City. (Cl. Ex. 5). He explained that the \$6,175.00 amount from the judgment represents unpaid rent and utilities from Mr. Joyner's tenancy.

John Solomond argued that he was led to believe that the VA would be paying Mr. Joyner's rent. There is no documentary evidence to corroborate this claim. In the email exchange between Ms. Feen and the Respondent, the Respondent clearly stated that a "Veteran Assistance program" would pay Mr. Joyner's security deposit and first month's rent. (Resp. Ex. 1). That happened.

⁶ It is not clear if the Veteran Assistance program referenced by the Respondent is run, funded, or associated with the United States Department of Veterans Affairs, commonly referred to as "the VA."

John Solomond testified that his impression that the VA would be paying Mr. Joyner's rent was "probably" based on a phone call with the Respondent while Mr. Joyner was a prospective tenant. The Respondent testified that she only spoke with John Solomond after he had approved Mr. Joyner as a tenant. She produced her phone records which show that the first phone call with John Solomond was on March 16, 2018. (Resp Ex. 2). John Solomond did not produce any evidence to rebut the fact that the first conversation between he and the Respondent occurred after he had approved Mr. Joyner as a tenant on March 12, 2018.

Further, even if a discussion did take place on or after March 16, 2018, and the Respondent did state that the source of Mr. Joyner's rent would be the VA, the Claimants cannot show that they relied upon the misrepresentation. In other words, they have not shown that they would not have approved Mr. Joyner as tenant absent the misrepresentation, since they had already approved Mr. Joyner as evidenced by the March 12, 2018 email from Ms. Feen to the Respondent. Finally, the Claimants did not elicit any evidence regarding the Respondent's intent. For all these reasons, the Claimant has not proven that the Respondent committed a fraudulent misrepresentation. *Id.* at 56-57. Additionally, "as a general rule . . . predictive statements of future events are not actionable as fraudulent or negligent misrepresentation." *Id.* at 73.

Therefore, I conclude that the Claimants have failed to prove that the Respondent misrepresented the source of Mr. Joyner's rent payments.

For the foregoing reasons, the Claimants, with respect to Mr. Gross, have proven that the Respondent was responsible for an act or omission that constituted embezzlement - fraudulent misappropriation by a fiduciary. The Claimants, with respect to Mr. Joyner, have not proven that the Respondent was responsible for an act or omission that constituted misrepresentation.

Therefore, the amount of their actual loss is \$1,077.66, and I recommend that the MREC award the Claimants that amount.

PROPOSED CONCLUSION OF LAW

Based on the Findings of Facts and Discussion, I conclude that the Claimants established by a preponderance of the evidence that they sustained an actual loss of \$1,077.66 compensable by the Fund resulting from an act or omission in the provision of real estate brokerage services that constitutes theft or embezzlement. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404, 17-410 (2018); Md. Code Ann., Crim. Law § 7-113 (2021); COMAR 09.11.03.04.

RECOMMENDED ORDER

I PROPOSE that the claim filed by John and Phillip Solomond on April 2, 2019 against the Maryland Real Estate Guaranty Fund be GRANTED in the amount of \$1,077.66.

March 16, 2022
Date Decision Issued

SIGNATURE ON FILE

Brian Patrick Weeks
Administrative Law Judge

BPW/dlm
#197052