BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION	*	
V.	*	**CASE NO. 2006-RE-161**
EVELYN JOHNSON	*	**OAH CASE NO. DLR-REC-24-07-44426**
Respondent	*	
And the	*	
CLAIM OF DELORES BAQUOL, and FORTUNE FINANCE, INC., AGAINST THE MARYLAND REAL ESTATE GUARANTY FUND	*	
	*	

* * * * * * * * * * * *

OPINION AND FINAL ORDER

This matter came before the Commission on argument on Exceptions filed by the Claimants, Delores Baquol and Fortune Finance, Inc., to the Proposed Order of October 15, 2008. On August 18, 2008, Administrative Law Judge Marc Nachman ("ALJ") filed a Recommended Decision and Order in which he recommended that the Claimants' claim against the Maryland Real Estate Guaranty Fund be denied.

On October 15, 2008, the Maryland Real Estate Commission ("Commission") issued a Proposed Order that affirmed the ALJ's Recommended Findings of Fact and Conclusions of Law but amended the Recommended Order. The Proposed Order included an additional Order to those recommended by the ALJ, to wit: Ordered that the Respondent, Evelyn Johnson, violated Md. Bus. Occ. and Prof. Art. §17-322(b)(4), (19), and (33), and COMAR 09.11.02.02D. The Proposed Order also corrected the

interpretation of a part of the real estate licensing law, specifically Section 17-404(a), Md. Bus. Occ. and Prof. Art. It adopted the ALJ's decision to deny the Claimants' claim.

A hearing was held by a panel of Commissioners consisting of Commissioners Anne S. Cooke, Georgiana Tyler and Colette P. Youngblood on January 21, 2009. Jessica Berman Kaufman, Assistant Attorney General, represented the Commission. The proceedings were electronically recorded.

SUMMARY OF THE EVIDENCE

On behalf of the Commission, six exhibits, including the file of the Office of Administrative Hearings, which included exhibits from the hearing before the ALJ, were entered into evidence. Ms. Kaufman objected to the proposed introduction of new evidence by Ms. Baquol on the grounds that the new evidence did not meet the requirements of Code of Maryland Regulations ("COMAR") 09.01.03.09. After reviewing the proposed new evidence, the Commission sustained Ms. Kaufman's objection on the grounds that the materials could have been discovered with the exercise of due diligence and presented at the hearing before the ALJ. (See COMAR 09.01.03.09K.)

PRELIMINARY MATTERS

By letter dated November 12, 2008, the Commission advised Evelyn Johnson that a hearing on Exceptions to the Proposed Order would be held at 500 North Calvert Street, Third Floor Conference Room, Baltimore, Maryland 21202 at 2:00 p.m. (See Real Estate Commission Exhibit 3.) The letter was sent by Certified Mail, Return Receipt Requested and a receipt, indicating delivery of the letter, was received by the Commission on November 18, 2008. The panel delayed the start of the hearing until 2:15 p.m. to allow

Ms. Johnson an opportunity to appear if she desired to do so. However, Ms. Johnson, who did not file Exceptions to the Proposed Order, did not appear. The hearing proceeded without her presence.

FINDINGS OF FACT

The Commission adopts the Findings of Fact recommended by the ALJ.

DISCUSSION

Delores Baquol and Fortune Finance, Inc. seek an award from the Real Estate Guaranty Fund (the "Fund") for the difference between the price paid for property purchased in Baltimore City, Maryland and the alleged fair market value of that property when purchased on the grounds that a misrepresentation by Ms. Johnson caused them to sustain an actual loss. The Claimants claim a loss of $25,000.00, the maximum allowed against the Fund.

Evelyn Johnson, a licensed real estate salesperson in Maryland, owned 1410 McCulloh Street in Baltimore City, Maryland. Ms. Johnson listed the property for sale on the MRIS database and in the "Remarks" section of the MRIS Synopsis report, written by the Respondent, stated:

> "LARGEST TOWNHOUSE ON MCULLOH (sic GREAT INVESTMENT OPPUTONITY (sic). NEEDS TO BE REHAB INTO ORIGINAL FAMILE (sic) OR *COULD BE 6 OR MORE APTS.*"

At some point, the property had been divided into six separate apartments, each with a separate entrance, kitchen and mailbox at the common entrance. An electric panel at the rear of the property had sockets for six electric meters, which had been removed. Ms. Johnson did not determine whether the property was, in fact, zoned for six apartments or whether the City would permit that use prior to listing the property for sale. The

Claimant, Delores Baquol, was interested in purchasing and renovating the property because she relied on Ms. Johnson's statement and believed it had six rental units. Neither the Claimants, nor anyone on their behalf, contacted the City or took any other action to determine how many rental units the City would allow in the property. The Claimant, Fortune Finance Inc., submitted a contract to purchase the property, in "as is" condition, for $90,000 on November 24, 2004. Prior to settlement on December 9, 2004, the parties entered into an Addendum which lowered the purchase price to $85,000 in recognition of work necessary to prepare the property for electrical connection. Subsequent to settlement, Delores Baquol, Fortune Finance, Inc., Ken Baquol (Claimant's husband and owner of Powercraft, a licensed home improvement contractor) and/or Powercraft attempted to secure permits to renovate the property into six units. Because the property had been vacant, the City had reduced the zoning on the property to two rental units and required additional renovations to be done. The City would allow a greater number of units after certain renovations and rezoning, but under no circumstances would the City allow the construction of more than four rental units in the property. (ALJ's Findings of Fact 1, 3, 5, 6, 10, 11, 12, 15, 19, 21, 24, and 25.)

In order to recover compensation from the Fund, a claimant must prove an actual loss based on an action or omission in the provision of real estate brokerage services, by a licensed real estate broker, licensed associate real estate broker, licensed real estate salesperson or an unlicensed employee of a licensed real estate broker, that involves a real estate transaction within the State. The claim must be based on an act or omission in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or that constitutes fraud or misrepresentation. Md. Code Ann., Bus.

Occ. & Prof. §17-404(a) (2004); COMAR 09.11.03.04. Md. Code Ann., Bus. Occ. & Prof., §17-402(c) allows the Real Estate Commission to adopt regulations to administer the Guaranty Fund. Based on that authority, the Real Estate Commission adopted COMAR 09.11.03.04 to regulate claims against the Guaranty Fund. That regulation provides that a guaranty fund claim shall be based on the alleged misconduct of a licensee and defines misconduct as an action arising out of a real estate transaction involving real estate located in this State which causes actual loss by reason of theft or embezzlement of money or property, or money or property unlawfully obtained from a person by false pretense, artifice, trickery, or forgery, or by reason of fraud, misrepresentation or deceit.

In this case, there is no dispute that the basis of this claim is the allegation of an "act or omission that occurs in the provision of real estate brokerage services by "... a licensed real estate salesperson" which "involve a transaction that relates to real estate that is located in the State." Md. Code Ann., Bus. Occ. & Prof. §17-404 (a). Ms. Johnson, a licensed real estate salesperson, advertised in the MRIS Synopsis that the Baltimore City, Maryland property in question could be divided into six or more rental units. It was reasonable to interpret this as meaning that it was legally possible to divide the property into as many as six units. This interpretation was made stronger by the fact that the building appeared to have been six rental units prior to being listed for sale. As a licensed salesperson, Ms. Johnson was charged with knowing that zoning regulations apply to rental property. She should have known that there was a legally limited number of rental units which the property could sustain and that the actual number of units could be determined by contacting the City's zoning agency. Nonetheless, Ms. Johnson made

the misrepresentation that the property could be six rental units without performing any research or due diligence.

The number of rental units was clearly material to an evaluation of the property for investment purposes. The greater the number of units, the greater the potential rental income and the value of the property. The Claimants relied on the statement that the property could be six rental units in deciding to purchase the property for $90,000.00. In fact, the zoning on the property only allowed two rental units in the property, making the material statement in the MRIS misleading and untrue. Thus, Ms. Johnson engaged in an act during the course of providing real estate brokerage services in the State that constituted misrepresentation of a material fact which was relied upon by the Claimants, to their detriment, in purchasing the property. The Claimants have expended tens of thousands of dollars, that were unanticipated, as a result of increased costs for renovations into less than six rental units because the Respondent misrepresented the number of legally authorized rental units in the property. In addition, the Claimants alleged that the purchase price paid was for a six rental unit property and a two rental unit property at that location had a lesser value than the purchase price paid. They contended that a two rental unit property in that area could have been purchased for $35,000.00.

The Claimants met their burden of proving that there was an act, constituting misrepresentation, by Evelyn Johnson, a licensed real estate salesperson, involving the provision of real estate brokerage services relating to Maryland real estate. The Claimants also have the burden of proving an actual loss i.e., that money was obtained from the claimants as a result of the misrepresentation.

The issue presented at the Exceptions hearing was whether evidence of the "actual loss" sustained by the Claimants was presented at the hearing before the ALJ entitling the Claimants to recover from the Fund. The ALJ noted that: "None of the parties presented testimony or an appraisal to show how much more the Claimant paid for the Property than it was worth, or conversely, whether the Property was actually sold for a fair price..." The Claimants contended that this statement was inaccurate. Ms. Baquol argued that the ALJ's decision had failed to account for the $48,000.00 in renovations made to the building subsequent to settlement which were required to downsize the number of apartments from the six advertised to the two permitted by the City as well as the loss of income from the promised but non-permitted rental units. The record of the hearing before the ALJ does disclose that a number of checks and invoices for labor, materials related to renovations of the property into less than six units, and the costs attendant to rezoning of the property, were submitted as Claimant's Exhibit 1. Those checks and invoices cover the period of January 10, 2005 (shortly after settlement) through May 16, 2006. A summary of expenditures, totaling $48,800.00, was contained in the record before the ALJ as Attachment 1 to Real Estate Commission Exhibit #4.

Ms. Baquol also pointed out that the record contained an appraisal of fair market value from the City of Baltimore in a letter dated June 30, 2005. The letter from the City, regarding the property at 1410 McCulloh Street, which was contained in the record as Attachment 9 to Real Estate Commission Exhibit 4, states , in pertinent part: "It is the City's objective to pay fair market value for your property based on appraisals by two independent, qualified, professional real estate appraisers. The City is offering the total fair market value of $24,200.00. This is the full amount determined by the City to be the

fair market value for your interest in the subject property." This valuation of the property occurred approximately six months after settlement and after certain renovations, involving the expenditure of tens of thousands of dollars, had already been performed on the property so that it could be two units.

It is, therefore, clear that testimony and evidence of the actual loss sustained by the Claimants was presented at the hearing before the ALJ. The difference between the final purchase price of $85,000.00 (for a promised six rental unit property) and the City's determination of its fair market value (as a two rental unit property), based upon two independent, professional appraisals, was $24,200.00, a spread of $60,800.00. This is the amount of "money " which the Respondent "obtained" from the Claimants as a result of her misrepresentation of the number of legally sustainable units in the property and constitutes the Claimants' actual loss. For purposes of recovery from the Fund, the maximum award is limited to $25,000.00. (See Md. Ann. Code, Bus. Occ. & Prof. §17-404(b).)

CONCLUSIONS OF LAW

The Commission adopts the Conclusions of Law recommended by the ALJ except for the Conclusion that the Claimants did not suffer an actual loss subject to an award from the Fund under §17-404 of the Business Occupations Article and COMAR 09.11.03.04. In regard to the Guaranty Fund claim, the Commission concludes, as a matter of law:

1. Evelyn Johnson was a licensed real estate salesperson at all times relevant to this matter.

2. Delores Baquol and Fortune Finance, Inc. suffered losses in excess of $25,000.00 due to the act of Evelyn Johnson in making a material misrepresentation of the number of legally sustainable rental units in property she was selling which was located in the State of Maryland.

3. Ms. Johnson was responsible for the losses, and was acting within the scope of her real estate salesperson's license when the losses occurred.

4. Delores Baquol and Fortune Finance, Inc. are entitled to recover for the actual losses they suffered as a result of the misrepresentation by Evelyn Johnson.

ORDER

The Exceptions of the Claimant having been considered, it is this 26 day of February, 2009 by the Maryland Real Estate Commission **ORDERED,**

1. That the Respondent, Evelyn Johnson, has violated Md. Bus. Occ. and Prof. Art. §17-322(b)(4), (19), and (33), and COMAR 09.11.02.02D;
2. That all real estate licenses held by the Respondent Evelyn Johnson be **SUSPENDED** for ninety days;
3. That the Claimants, Delores Baquol and Fortune Finance, Inc. be reimbursed $25,000.00 from the Maryland Real Estate Guaranty Fund to compensate for the actual loss that they sustained because of the conduct of the Respondent.
4. That all real estate licenses held by Respondent, Evelyn Johnson, be and are hereby **SUSPENDED** until the Maryland Real Estate Guaranty Fund is

reimbursed by the Respondent and that this suspension is in addition to and not in lieu of the ninety days suspension set forth above.

5. That the records and publications of the Maryland Real Estate Commission reflect this decision.

MARYLAND REAL ESTATE COMMISSION

By: Anne S. Cooke by Katherine F. Connelly, Exec. Dir.

NOTE: A judicial review of this Final Order may be sought in the Circuit Court of Maryland in which the Appellant resides or has his/her principal place of business, or in the Circuit Court for Baltimore City. A petition for judicial review must be filed with the court within 30 days after the mailing of this Order.

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION	*	
v.	*	
EVELYN JOHNSON **Respondent**	*	**CASE NO. 2006-RE-161**
and	*	**OAH NO. DLR-REC-24-07-44426**
CLAIM OF DELORES BAQUOL, and FORTUNE FINANCE, INC. 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 August 18, 2008, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 15th day of October, 2008,

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 Evelyn Johnson violated Md. Bus. Occ. and Prof. Art. §17-322(b)(4), (19), and (33), and COMAR 09.11.02.02D;

ORDERED that all real estate licenses held by the Respondent Evelyn Johnson be **SUSPENDED** for ninety days;

ORDERED that the Claim of Delores Baquol and Fortune Finance, Inc. against the Maryland Real Estate Guaranty Fund is **DENIED;**

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

D. Pursuant to §10-220 of the State Government Article, the Commission finds that, although the result reached by the Administrative Law Judge does not have to be changed, his interpretation of a part of the real estate licensing law is incorrect and must be corrected. Section 17-404(a)(2)(iii)(2) of the Business Occupations and Professions Article provides that a claimant may recover from the Guaranty Fund based on an act or omission that constitutes fraud or misrepresentation. COMAR 09.11.03.04 sets out the statutory requirements that support the claim in a slightly different format. That regulation was not intended to change the language of the statute itself and cannot be read to do so.

In his Recommended Decision, the Administrative Law Judge stated that loss suffered by a claimant as a result of fraud or misrepresentation can only be awarded if the money was actually

obtained by the licensee herself. Under this interpretation, a claimant would not be able to recover losses suffered as a result of misrepresentation or fraud unless the losses involved personal financial benefit to the licensee. In footnote 14, he says, "If the Respondent were representing a seller and not selling her own property, the actual loss would only be the increase in the amount of her commission, as that would be the amount 'obtained by the Respondent'." This is not a requirement of the statute, and the regulation, while it may be confusing in the way it is punctuated, was not intended to cause that result. The regulation should be read, as to fraud and misrepresentation, as follows:

> B. For the purpose of a guaranty fund claim, misconduct:
>
> (1) Is an action arising out of a real estate transaction involving real estate located in this State which causes actual loss ... by reason of fraud, misrepresentation, or deceit;

There are many circumstances where a licensee may misrepresent the condition of property to a consumer, who then incurs costs as a result. Those costs would be recoverable from the Fund, even if they were paid to a plumber for plumbing repairs or to a roofer for roofing repairs. The Administrative Law Judge's statement that "The Guaranty Fund was established to make claimants whole if the real estate professional profited from thefts, embezzlements, frauds, misrepresentations or trickery" is incorrect. There is no requirement in statute or regulation that restricts recovery from an act of fraud or misrepresentation in that way.

The Administrative Law Judge did properly consider the Claimant's burden of proving her loss. She was required to show what actual loss she suffered as a result of the misrepresentation of the licensee, i.e., the misrepresentation that the building could be used as six rental units. There is nothing in the record to show what the building would have been worth if it could have only two rental units. The Administrative Law Judge stated, "None of the parties presented testimony or an appraisal to show how much more the Claimant paid for the Property than it was worth, or conversely, whether the Property was actually sold for a fair price - i.e., what the value of a six unit apartment building was at that location and at that time as opposed to the value of a property that had a less amount of rentable units."

Had the Claimant presented testimony to that effect, she would have been entitled to recover the difference in value from the Guaranty Fund, whether the Respondent was an owner of the property, or an agent of the owner. However, she did not, and therefore the claim was properly denied.

E. Pursuant to Code of Maryland Regulations (COMAR) 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.

Katherine F. Connelly
Executive Director
Maryland Real Estate Commission
for Anne S. Cooke, Commissioner

MARYLAND REAL ESTATE	*	**BEFORE MARC NACHMAN,**
COMMISSION	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE OF**
EVELYN JOHNSON, RESPONDENT	*	**ADMINISTRATIVE HEARINGS**
and the	*	
CLAIM OF DELORES BAQUOL, and	*	**OAH CASE NO: DLR-REC-24-07-44426**
FORTUNE FINANCE, INC., AGAINST	*	**COMPLAINT NO.: 2006-RE-161**
THE MARYLAND REAL ESTATE	*	
COMMISSION GUARANTY FUND	*	

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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 November 4, 2005, Delores Baquol, (Claimant)[1] on behalf of Fortune Finance, Inc. (Fortune), filed a complaint (the Complaint) with the Maryland Real Estate Commission (REC). The Claimant also filed a claim for reimbursement (the Claim) against the REC's Guaranty Fund (the Fund) for losses allegedly caused by the acts and omissions of a licensed real estate agent, Evelyn Johnson (Respondent), regarding the listing for sale and sale of the Respondent's property at 1410 McCulloh Street, Baltimore, Maryland (the Property). Based on the Complaint,

[1] Delores Baquol signed the various documents in this case in her own name without any corporate designation, with her husband Ken Baquol, and either "c/o" (in care of) or "T/A" (trading as) Fortune. References in this decision to the Claimant will be to Ms. Baquol acting in one of these capacities.

the REC determined that charges against the Respondent were warranted and, on September 23, 2007, the REC filed a Statement of Charges and Order for Hearing (the Charges). The Charges also indicated that the REC determined that the Claimant was entitled to a hearing on the Claim against the Fund and that these matters arose out of the same facts and circumstances and, therefore, should be heard and determined at the same time. These matters were transmitted to the Office of Administrative Hearings (OAH) on October 9, 2007.

On May 19, 2008, I held a hearing at the OAH in Hunt Valley, Maryland on the Charges against the Respondent and the Claim against the Fund. Assistant Attorney General Peter Martin appeared on behalf of the REC; the Fund was represented by Assistant Attorney General Matthew Lawrence; and the Claimant was represented by Joseph H. Ostad, Esquire. The Respondent was present and represented herself.

I heard this case pursuant to § 17-324 of the Business Occupations and Professions Article (Bus. Occ. & Prof.) of the Maryland Annotated Code (2004). Procedure in this case is governed by the Administrative Procedure Act, Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2004 & Supp. 2007), OAH's Rules of Procedure, COMAR 28.02.01, and the REC's Hearing Regulations, COMAR 09.11.03 and 09.01.03.

ISSUES

1. Did the Respondent violate § 17-322(b)(4) of the Business Occupations Article by intentionally or negligently failing to disclose to any person with whom the applicant or licensee deals a material fact that the licensee knows or should know and that relates to the property with which the licensee or applicant deals?

2. Did the Respondent violate § 17-322(b)(19) of the Business Occupations and Professions Article by advertising in a misleading or untruthful manner?

3. Did the Respondent violate § 17-322(b)(33) of the Business Occupations and Professions Article by violating any regulation adopted under the Business Occupations title or any provision of the code of ethics?

4. Did the Respondent violate COMAR 09.11.02.02D by failing to make reasonable efforts to ascertain all material facts concerning the subject property, in order to fulfill her obligation to avoid error, exaggeration, misrepresentation or concealment of material facts ?

5. Did the Claimant suffer an actual monetary loss as a result of the conduct of the Respondent and, if so, what is the amount of the loss?

SUMMARY OF THE EVIDENCE

Exhibits

The REC submitted the following documents, which I admitted into evidence:

REC #1: Notice of Hearing sent to Respondent, mailed February 7, 2008 with certified envelope indicating that the letter was unclaimed

REC #2: Correspondence sent to Respondent by REC by certified and regular mail, dated April 30, 2008

REC #3: The Respondent's licensing record with the REC (License # 05 529717)

REC #4: Investigative Services Report of Investigation prepared by Jack L. Mull, Jr., with the following attachments:

1. Complaint and Guaranty Fund Claim

2a. Broker's Response

2b. Respondent's Response

3. Request for Investigation

4. Metropolitan Regional Information Systems, Inc. (MRIS), Synopsis Report

5. Contract of Sale

6. Handwritten Addendum to contract

7. Settlement Statement

8. Building Permit Receipt

9. Letter from the City of Baltimore (the City), dated June 30, 2005

10. Letter from the City, dated December 27, 2004

11. Letter from the City, dated August 25, 2005

12. Land records regarding the Property

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

Claimant #1: Invoices from Powercraft Contracting Company (Powercraft), with accompanying checks from Fortune, varying dates

Claimant #2: Code of Ethics

Claimant #3: MRIS report concerning the Property, dated October 29, 2005.

I admitted the following exhibit into evidence on behalf of the Licensee:

Licensee #1: MRIS Synopsis, dated May 18, 2008

Testimony

The REC called the following witnesses:

1. Claimant
2. Ken Baquol
3. The Claimant's realtor, Margaret Wilkinson
4. Jack Mull, Jr., Investigator for the REC

The Claimant testified on her own behalf and also presented the testimony of Ken Baquol and Margaret Wilkinson. The Respondent testified on her own behalf and did not present any other witnesses. The Fund did not present any witnesses.

FINDINGS OF FACT

Having considered the testimony and exhibits presented, I find the following facts by a preponderance of the evidence:

The Respondent's ownership of the Property and her listing it for sale

1. The Respondent has been a licensed real estate agent in Maryland since July 13, 2001,[2] under license number 05-529717.

2. The Respondent is currently affiliated with Exit Powerhouse Realty in Lanham, Maryland.

3. The Respondent owned the Property. A bank that had foreclosed on the Property sold it to her at some time prior to her listing it for sale in June 2004.[3]

4. The Respondent listed the property for sale on or about June 18, 2004, the date identified as such in the MRIS database (Lic. Ex. # 1, Cl. Ex # 3).

5. The "Remarks" section of the MRIS Synopsis report, written by the Respondent (Lic. Ex. # 1 and REC Ex. # 4, Attachment 4), read as follows:

> LARGEST TOWNHOUSE ON MCULLOH (sp). GREAT INVESTMENT OPPUTONITY (sp). NEEDS TO BE REHAB INTO ORIGINAL FAMILE (sp) OR *COULD BE 6 OR MORE APTS.*

6. At some point in its history, the Property had been divided into six separate apartments, each with a separate entrance, kitchen and mailbox at the common entrance. At the rear of the Property was an electric panel with sockets for six electric meters, which appear to have been installed at one time, but which had since been removed.

7. When the Respondent listed the Property for sale, it was in poor condition and uninhabitable. There were no active tenants in the Property and the Baltimore Gas and Electric Company (BGE) had already turned off utility service to the Property due to the Property's unsafe condition.

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[2] The Respondent's license was inactive from July 23, 2007, through April 10, 2008. The inactive period is not relevant to the present case.

[3] The date that the Respondent purchased the Property was between 2002, when the foreclosing bank conveyed the Property to the Respondent, and June 2004, when the deed was recorded. The exact date of her acquisition is immaterial to the decision in this matter.

Events leading up to the Claimant's purchase of the Property

8. The Claimant, who already owned investment property;[4] advised Margaret Wilkinson, a realtor whom she had retained for prior real estate transactions, to alert her to potential investment property opportunities.

9. Ms. Wilkinson saw the Property listed on MRIS, read the Respondent's description of the Property, and advised the Claimant that it was for sale. The Claimant and her husband inspected the Property, noting that extensive renovations would be required before it was once again habitable.

10. The Respondent did not determine whether the property was zoned for six rental units or whether the City[5] would permit that use; in fact, the Respondent did not make any diligent attempt to get the zoning or permitted use information from the City or take any other action to ascertain that status prior to listing the property for sale.

11. Neither the Claimant, nor anyone on her behalf, contacted the City or took any other action to determine the zoning on or permitted use of the property or contact the City to determine how many rental units the City would allow in the Property.

12. The Claimant was interested in purchasing and renovating the property because she believed that it had six rental units. She instructed Ms. Wilkinson to begin the purchase process and to contact the Respondent.

13. When contacted, the Respondent advised Ms. Wilkinson that there was an existing contract on the property which had a financing contingency. She therefore told Ms. Wilkinson that she would consider a cash contract, *i.e.*, one that did not have any

[4] It was unclear whether the Claimant owned the other investment property individually or through Fortune. For the purposes of this decision, that distinction is immaterial, as the Claimant was involved in these other transactions individually or as an officer or owner of Fortune.

[5] Reference to the City is either the Zoning office, or the Division of Construction and Building Inspection.

financing or other contingencies, and that the sale needed to be concluded quickly.

14. In fact, on November 9, 2004, a putative buyer submitted to the Respondent a contingent contract to purchase the property (REC Ex. # 4, Attachment 13), but that contract was withdrawn by means of a Release signed by the putative buyer on November 20, 2004, which was ratified by the Respondent on November 22, 2004, two days before the Claimant submitted her contract to the Respondent.

15. On November 24, 2004, the Claimant submitted a contract to purchase the property for $90,000.00, in "as is" condition and without any contingencies that would allow the Buyer to void the contract (*e.g.*, financing, inspection, etc.).

16. On November 26, 2004, the Respondent ratified and accepted the Claimant's contract.

17. The buyer identified in the contract was Fortune, a company that the Claimant owned (REC Ex. # 4, Attachment 5).[6]

18. Prior to settlement on the property, the Claimant or her husband contacted the BGE about utility service and were advised that it would cost approximately $5,000.00 of additional expenses to prepare the property for electrical connection.

19. Prior to settlement on December 9, 2004, the parties entered into an addendum which lowered the purchase price to $85,000.00 in recognition of the additional expense (REC Ex. # 4, Attachment 6).

20. Settlement on the Property occurred on December 9, 2004,[7] at which time the Claimant tendered the balance due under contract (plus additional settlement charges required to

[6] The evidence was unclear about who owned Fortune. Correspondence to Mr. Mull, the REC investigator, was signed by the Claimant and her husband, with reference in the letter to both acting in concert: "The property was sold to *us* as a six unit building and was set up as six separate units. *We* had decided to build as a four unit building, but when *we* applied for the permits, *were* told that the property had been flagged as vacant and was rezoned to two units...." (REC Ex. # 4, Attachment 1) (emphasis added). Whether the Claimant acted alone or with her husband is irrelevant to determining either the regulatory action or the claim against the Fund.

[7] Under the Contract, settlement was to occur on or before December 28, 2004. The parties agreed to the earlier settlement date of November 9, 2004.

purchase the Property), and the Respondent conveyed the Property to the buyer, Fortune.

Post-settlement renovations and expenses related thereto

21. Ken Baquol, the Claimant's husband, is the owner of Powercraft, a licensed home improvement contractor.

22. One reason that the Claimant purchased the Property was to enable Powercraft employees to perform the renovations on the Property in order to keep actively working during the winter when other home improvement work might be slow.

23. Powercraft performed work on the Property and charged Fortune for the work it performed. There were no written agreements between Powercraft and Fortune regarding the scope of work to be performed on the Property.

24. Claimant, Fortune, Ken Baquol and/or Powercraft[8] attempted to secure permits to renovate the Property into six rental units.

25. Because the Property had been vacant, the City reduced the zoning on the property to two rental units and required additional renovations to be done. The City would allow a greater number of units after certain renovations and rezoning, but under no circumstance would the City allow the construction of more than four rental units in the Property.

DISCUSSION

I. Regulatory Charges

The charges against the Respondent arose out of a contract for sale dated on or about November 26, 2004, and the subsequent addenda to that contract dated December 9, 2004. The REC alleges that the Respondent was also the listing agent for the Property, which she advertised

[8] At various times, the Claimant or her husband undertook these actions, although it was unclear whether each did so individually or on behalf of their respective corporate entities. The specific identity and capacity of the party in contact with the City is immaterial to this decision.

could be divided into six or more apartments. The REC further alleges that the Claimant was made aware of and relied on the Respondent's statement that the Property could be six or more apartments, and as a result of this statement, purchased the Property. The REC further alleges that the information provided by the Respondent was incorrect, as the Claimant found out that the City would only allow two apartments in the Property. The REC further charges that the Respondent did not make a reasonable effort to ascertain the accuracy of the information that she provided.

The REC charged the Respondent with violations of the statutory and regulatory sections governing licensed real estate brokers and agents. The sections of the law that the Respondent allegedly violated are set forth below.

> § 17-322 Denials, reprimands, suspensions, revocations, and penalties – Grounds
>
> ...
>
> (b) Grounds. – Subject to the hearing provisions of § 17-324 of this subtitle, the REC may deny a license to any applicant, reprimand any licensee, or suspend or revoke a license if the applicant or licensee:
>
> ...
>
> (4) intentionally or negligently fails to disclose to any person with whom the applicant or licensee deals a material fact that the licensee knows or should know and that relates to the property with which the licensee or applicant deals;
>
> ...
>
> (19) advertises in any misleading or untruthful manner or violates § 17-527.2[9] of this title;
>
> ...
>
> (33) violates any regulation adopted under this title or any provision of the code of ethics;
>
> (c) Penalty. – (1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the REC may impose a penalty not exceeding $5,000 for each violation.

Bus. Occ. & Prof. § 17-322(b)(4), (19), (33) and (c)(1).

[9] This section is inapplicable to this matter, as it prohibits misidentification of agents in advertisements.

The Code of Ethics for Real Estate agents is found at COMAR 09.11.02, which provides, in pertinent part:

> 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.

The REC, as the moving party on the charges, has the burden of proof, by a preponderance of the evidence, to demonstrate that the Respondent violated the statutory and regulatory sections at issue. *See, e.g.*, Md. Code Ann., State Gov't Art., § 10-217 (2004); *Commissioner of Labor and Industry v. Bethlehem Steel Corp.*, 344 Md. 17 (1996). For the reasons discussed below, I find that the Respondent violated all of the statutory and regulatory provisions with which she was charged.

A. Business Occupations & Professions § 17-322(b)(4)

Under Bus. Occ. & Prof. § 17-322(b)(4), a licensee cannot intentionally or negligently fail to disclose to any person with whom he or she deals a material fact that he or she knows or should know, and that relates to the subject property. The analysis of this violation is simplified by considering the elements of the statute out of order.

1. *"...fails to disclose...a...fact...that relates to the subject property..."*

The Respondent advertised in the MRIS Synopsis that the Property could be divided into six or more rental units, misrepresenting a fact, which clearly relates to the Property. At the hearing, she claimed that this representation was accurate, reading this statement aloud, emphasizing the word *could*: "...OR *COULD* BE 6 OR MORE APTS." She claimed that the term meant that it is *possible* to have six rental units in the Property, but she was making no guarantee that it could be done.

It was not unreasonable for the Claimant and her agent to interpret this statement to mean that that it would be possible to legally divide this property from one to six apartments. This statement was especially harmful because the Property appeared as though that it had been operated with six separate rental units due to the number of mailboxes, entry doors and meter sockets (the location where the meters would be installed).

The Respondent failed to disclose the proper number of rentable units permitted in the Property,

2. *"...disclose ... a ... fact that he or she knows or should know...."*

The next question is whether the Respondent "knows or should know" the number of rental units permitted in the Property, a fact important to its value and usefulness. The concept of "know or should know" is considered to be the "discovery rule" which has been the subject of countless Maryland appellate court decisions as it concerns the statutes of limitation. Because this concept is so similar to the one in the case at bar, cases interpreting the civil statute of limitation are equally applicable to the knowledge requirement of Bus. Occ. & Prof. § 17-322(b)(4).

The general period of limitations for filing causes of action in the Maryland courts is "...within three years from the date it *accrues*...." MD Code Ann., Courts and Judicial Proceedings, § 5-101 (2006)(emphasis added). The date of accrual has been interpreted by the Maryland courts to include a "discovery rule." The statute of limitations in civil actions begins to run when a plaintiff has knowledge of circumstances which would cause a reasonable person in the position of the plaintiff to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged cause of action. *Bank of New York v. Sheff*, 382 Md. 235 (2004). This is also considered to be "inquiry notice," which is present when

a plaintiff has knowledge of circumstances that would cause a reasonable person to undertake an investigation. *American General Assur. Co. v. Pappano*, 374 Md. 339 (2003). Absolute and perfect knowledge of the fact is not necessary – just that the licensee, with due diligence, *reasonably should have known* of the fact. *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A*, 152 Md.App. 698 (2003), *certiorari denied* 841 A.2d 340, 379 Md. 225.

When a person gains knowledge sufficient to put her on inquiry, she would be "charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation..." *O'Hara v. Kovens,* 305 Md. 280, 503 A.2d 1313 (1986). Knowledge is attributed to a person who has "knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry [thus, charging the individual] with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued." *Poffenberger v. Risser,* 290 Md. 631, 637 (1981).

Because she owned another building in Baltimore City, she knew that the City had zoning codes, and that an owner cannot just rent out as many apartments as he or she wants. Because she was a realtor who owned at least one other property in Baltimore City (making her more knowledgeable than "a person of ordinary prudence"), and because she knew that there were zoning regulations that applied to the Property ("knowledge of circumstances"), she was charged with the knowledge of what a visit to the City might disclose – that the Property was not zoned for more than two apartments. The Respondent acknowledged that she did not check with the City, a reasonably simple process, to determine the number of allowable rental units before she wrote the MRIS Synopsis. She therefore knew or should have known that there was a limitation on the number of rental units permitted, and she was therefore charged with that

knowledge. The true number of allowable apartment units was a fact that she failed to disclose. *Crowder v. Master Financial, Inc.*, 176 Md.App. 631, 658 (2007).

3. *"...a material fact...."*

The representation was material, both objectively and subjectively. The Respondent acknowledged that the Property was for investment purposes, as the synopsis stated, "GREAT INVESTMENT OPPUTONITY (sp)." The number of rental units was a material fact in such a sale, as the value of investment real estate (*i.e.*, property that a buyer purchases, not to live in, but to rent out) is a function of the income that the property can generate. As investment property, the number of apartment units determines the number of renters, and the number of renters determines the property income. The sum of the six rental units' income is greater than the value of the rental of one or two rental units, so the value to an investor is increased in proportion to the number of rentable units.

The Claimant and her husband both testified that their purchase of the Property was driven by the possibility of renting six units, which they believed existed. In *Attorney Grievance Com'n v. Floyd*, 400 Md. 236, 246 (2007), quoting from *Brodsky v. Hull*, 196 Md. 509, 515-16 (1950), a fact is considered to be material "...if its existence or nonexistence is a matter to which a reasonable man would attach importance in determining his choice of action in the transaction." The number of rental units in the Property was an important factor in deciding to purchase the Property, which a reasonable investor would do. It was certainly material to the Claimant. The number of rental units in the Property was, therefore, a material fact to them.

4. *"...intentionally or negligently..."*

The Respondent published the representation that the Property "could be" six or more units. She intentionally made the disclosure in the MRIS synopsis report which Ms. Wilkinson

read and brought to the Claimant. If she did not know or was careless about the truth of the statement, she was negligent in making it. Whether the representation was intentional or negligent is not material to the decision in this case.

5. *"...to any person with whom he or she deals...."*

The Respondent failed to disclose the number of allowable apartment units to public in general as well as to the Claimant. The MRIS is a means of advertising real property to other realtors. By placing information in the Synopsis of the MRIS report, the Respondent was potentially dealing with the entire real estate community, as well as those who want to join that community by purchasing real property. More specifically, the advertisement was read by the Claimant, with whom she directly dealt. This element has been met as well.

Accordingly, I find that the Respondent violated Bus. Occ. & Prof. § 17-322(b)(4), by intentionally or negligently failing to disclose to any person with whom he or she dealt a material fact that he or she knew or should have know, and that relates to the subject property.

B. Bus. Occ. & Prof. § 17-322(b)(19)

The MRIS is a means of advertising real property to other realtors. The Respondent advertised the property in the MRIS to other realtors - and ultimately to their clients - making the representation in the Synopsis that there "could be" six or more apartments in the Property. The inclusion of the number of units in the MRIS synopsis was meant to catch the eye of a real estate investor, who was being sold the Property as a "great opportunity."

In fact, the zoning only allowed two rental units in the Property, making the statement in the advertisement misleading and untrue, violating Bus. Occ. & Prof.§ 17-322(b)(19).

C. Business Occupations & Professions § 17-322 (33) and the Code of Ethics COMAR 09.11.02.01D

A violation of the Code of Ethics is sanctionable under Bus. Occ. & Prof. §17-322(b)(33). The REC Code of Ethics is found at COMAR 09.11.02. Under COMAR 09.11.02.01D, the Respondent had "the obligation to avoid error, exaggeration, misrepresentation, or concealment of material facts." For the reasons expressed above, the number of rental units was a material fact to putative buyers of the property. The Respondent had a duty to avoid the error and misrepresentation in the MRIS synopsis by making "a reasonable effort to ascertain all material facts" concerning the Property. It would have been a simple matter for the Respondent to contact the City to ascertain the permitted zoning or other use restrictions. Zoning is public information available to everyone who asks – she failed to do so, which was as easy as it was reasonable to do. By violating the Code of Ethics, she violated Bus. Occ. & Prof. § 17-322(b)(33).

The Respondent conceded that she did not research whether the Property could be used for six rental units. Instead, the Respondent merely made assumptions about the possible use of the Property, without any due diligence or research. In her interview with Mr. Mull, the REC investigator, she acknowledged this lack of diligence by stating that she did not check with the City, relying instead on statements made by neighbors that the Property had been used as either an apartment building or nursing home.

Even if the Respondent did not know that six rental units were not permitted on the Property, this was a fact that she *could have made reasonable efforts to ascertain.* As a realtor, the Respondent knew the value of the Property was driven by the number of rental units. Had she contacted the City, she would have discovered the zoning had been reduced. She, therefore,

was charged with the knowledge that would have come from acting with the required due diligence.

Because the Respondent did not make a reasonable effort to ascertain at least one material fact regarding the property before representing that the Property could support six rental units, her conduct violates COMAR 09.11.02.01D. This sort of conduct is the antithesis of the Respondent's duty to protect the public against fraud, misrepresentation or unethical practices in the real estate industry.[10]

II. Penalties

Section 17-322(c)(1) of the Business Occupations Article provides that a licensee may be reprimanded or have his/her Real Estate Agent's, Associate Broker's or Broker's license suspended or revoked for violations of the Maryland Real Estate law. The section also provides that instead of *or in addition to* reprimanding a licensee or suspending or revoking a Real Estate license, the REC may impose a civil penalty not to exceed $5,000.00 for each violation.[11]

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[10] The Complaint contains matters not included in the Charges or presented at the hearing, as the REC had apparently already resolved not to pursue those issues. The Hearing Order does not cite statutes or regulations concerning the Respondent's alleged concealment of the condemnation of the property or the requirement that the Claimant pay a cash price or use a title company recommended by the Respondent.

Mr. Mull determined through his investigation that, prior to the time that the Property was listed up to the date that settlement occurred on December 9, 2004, there were no active condemnation proceedings instituted by the City against the Property nor were there any related liens on the property record. The City's first contact with the Respondent regarding its proposed condemnation and desire to acquire the Property was on December 27, 2004, when the City mailed the Respondent a letter stating its intentions. The letter was mailed to the Respondent at the Property address by certified mail which was unclaimed. The Respondent did not receive the letter, as it was only mailed to the Property address, and was not sent to the Respondent at her home address. On June 30, 2005, the City mailed a letter to Fortune, addressed to the Claimant's residence, advising of its intentions to condemn and acquire the Property. The Claimant and her husband requested that the City suspend their acquisition process while the Property was being renovated; the City agreed to this suspension and allowed the renovations to continue. The Respondent was not aware of the City's proposed condemnation until it was brought to her attention by the Claimant.

The request for a cash sale was not adequately proven to be a violation, and was also not included in the REC's Hearing Order. Even if the Respondent asked for a cash offer, such a request was not out of line.

There was also insufficient evidence for the REC to charge a violation on the allegations that the Respondent required the use of a particular title company. It appeared merely to be a suggestion to speed the process and possibly save some money, as title work was recently performed. The contract had no such term. Therefore, no violation resulted from that allegation, either.

[11] Emphasis added.

Section 17-322(c)(2) of the Business Occupations Article lists the factors that must be considered in imposing a civil penalty:

> (2) To determine the amount of the penalty imposed, the REC shall consider:
>
> (i) the seriousness of the violation;
>
> (ii) the harm caused by the violation;
>
> (iii) the good faith of the licensee; and
>
> (iv) any history of previous violations by the licensee.

Md. Code Ann., Bus. & Prof. § 17-322(c)(2) (Supp. 2007).

The Respondent's violations are serious. In order to ensure that the property would sell, the Respondent lied about the permitted use of the property. She could have easily checked zoning or permitted use with the City so that the information she wrote on the MRIS report was accurate, but she decided not to do so. Her actions demonstrate bad faith and undermine the integrity and dignity of the real estate profession. The Respondent put the harm in play, which went unchecked by the Claimant. The Respondent's actions were deliberate and calculated in order to close the sale. The Claimant was harmed by the Respondent's actions, because the Claimant did not check the zoning either. The REC did not present evidence of any disciplinary history that could be considered.[12]

The REC has recommended that the Respondent have her license suspended for ninety days. Based on the seriousness of the violations, and the financial advantage which the Respondent dealt herself by misrepresenting the number of rentable units which the Property was

[12] There was mention of a closed disciplinary action, but there was no evidence that any disciplinary action was taken against the Respondent.

zoned for, I agree with the REC's recommendations.[13] Consequently, I recommend the suspension of the Respondent's real estate license for ninety days.

III. Guaranty Fund Claim

The Claimant has the burden of proving that she is entitled to reimbursement from the Fund. Bus. Occ. & Prof. §17-407(e). The Claimant claims a loss of $25,000.00, the maximum claim allowed against the Fund. The Claimant and her related companies have surely expended tens of thousands of dollars that were unanticipated as a result of increased costs because the Respondent misrepresented the number of rental units that the Property could sustain. The Claimant claims that her loss was due to the acts or omissions of the Respondent. The issue is whether her claim is for an actual loss which is compensable by the Fund.

Section 17-404 of the Business Occupations Article sets forth the criteria for recovery against the Fund:

> **§ 17-404. Recovery of compensation from 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; 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

[13] The REC did not recommend that I consider a monetary penalty. Because the Respondent received what appeared to be a profit on the sale of the Property, selling it as a result of her false representation, I would recommend the maximum monetary penalty. However, I would caution against imposing such a penalty on Due Process grounds; as it was not requested at the hearing, the Respondent did not have the opportunity to argue against its imposition.

(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.

Section 17-402 (c) of the Business Occupations Article allows the REC to adopt regulations to administer the Fund. Under that power, the REC adopted COMAR 09.11.03.04 to regulate claims against the Guaranty Fund:

.04 Claims against the Guaranty Fund.

A. A guaranty fund claim shall be based on the alleged misconduct of a licensee.

B. For the purpose of a guaranty fund claim, misconduct:

(1) Is an action arising out of a real estate transaction involving real estate located in this State which causes actual loss by reason of theft or embezzlement of money or property, or money or property unlawfully obtained from a person by false pretense, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit....

In this case, there is no dispute that the basis of this claim is the allegation of "an act or omission that occurs in the provision of real estate brokerage services by...a licensed real estate salesperson" which "involve a transaction that relates to real estate that is located in the State." The real question is the characterization of the act or omission under Bus. Occ. & Prof. §17-404(a)(2)(iii) or the expanded definition of "misconduct" in COMAR 09.1.03.04B(1).

The Claimant alleges that she would not have purchased the property had she known the true zoning – that the Property was only zoned for two rental units because it was vacant for so long. She also claims to have lost tens of thousands of dollars because of the increased costs associated with the need to rezone the property, which still could not support the six rental units

represented in the MRIS synopsis. Having already found statutory violations, the statutory requirement of an "act or omission" is satisfied.

Under section 17-404, even if the Respondent committed a prohibited act or made a proscribed omission, if she did not obtain money from the Claimant, there would be no basis for a claim under paragraph (a)(2)(iii). The claimed damages evidence the post-settlement costs as opposed to comparing the value of the property as zoned to the amount paid at the time of the purchase – *i.e.*, only the latter represents money obtained by the Respondent from the Claimant. In the instant case, the Respondent obtained money from the Claimant, but it was paid in exchange for sale of the property. It was unclear from the testimony – as there was no such testimony to rely upon – that the value of the Property was not $85,000.00, but some lesser amount, and the Respondent obtained the spread between those two values.[14] None of the parties presented testimony or an appraisal to show how much more the Claimant paid for the Property than it was worth, or conversely, whether the Property was actually sold for a fair price – *i.e.*, what the value of a six unit apartment building was at that location and at that time as opposed to the value of a property that had a lesser amount of rentable units. This would be the amount of money that the Respondent *obtained* from the Claimant in the transaction:

> 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.

Bus. Occ. & Prof. § 17-404(a)(2)(iii). The regulations clarify that the Fund reimburses a claimant for money that is not just out of pocket costs, but which inures to the licensed professional "by reason of theft or embezzlement of money or property, or money or property

[14] In the present case, every dollar the Respondent obtained in this transaction might be counted towards the actual loss. If the Respondent were representing a seller and not selling her own property, the actual loss would only be the increase in the amount of her commission, as that would be the amount "obtained" by the Respondent.

unlawfully *obtained from a person* by false pretense, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit..." COMAR 9.11.03.04B(1)[emphasis added]. Even though Bus. Occ. & Prof. § 17-404(a)(2)(iii)(2) expands recovery for "fraud[15] or misrepresentation,[16]" COMAR 09.11.03.04 explains that the claim is only allowed for the money that was actually "obtained" by a licensee, and not just spent by a claimant on account of the licensee's act or omission. Money lost as a result of the misrepresentation is subject to a Fund award only for the amounts that the licensee "obtained" from the victim. In the present case, the Claimant may have paid the Respondent more than the property was really worth; this would be the amount that the Respondent "obtained" from the Claimant as a result of her act or omission, yet this amount was not quantified by probative evidence.

Unfortunately, people can lose money as a result of a real estate transaction, and sometimes the losses are attributable to acts or omissions of a realtor, even if no money goes to the realtor. The Guaranty Fund was established to make claimants whole if the real estate professional profited from thefts, embezzlements, frauds, misrepresentations or trickery. In the

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[15] "The Court of Appeals has set forth the following five elements that a plaintiff must prove by clear and convincing evidence in order to prove a cause of action in tort for fraud or deceit:

> "(1) that the defendant made a false representation to the plaintiff, (2) that its falsity was either known to the defendant or that the representation was made with reckless indifference as to its truth, (3) that the misrepresentation was made for the purpose of defrauding the plaintiff, (4) that the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) that the plaintiff suffered compensable injury resulting from that misrepresentation."

Crowder v. Master Financial, Inc., 176 Md.at 662.

[16] "The following elements are required to assert a claim for negligent misrepresentation:

> "(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 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."

Lloyd v. General Motors Corp., 397 Md. 108, 135-136 (2007).

present case, the losses presented at the hearing derived from the post-settlement costs that the Claimant incurred. Initially, the Respondent's representation was intended to induce the sale of the property, from which she profited; the costs incurred, even if attributable to the Respondent, was not money obtained by the Respondent from the Claimant, which is what the Fund was intended to remedy.

Accordingly, I find that the Claimant did not prove that she is entitled to recovery from the Fund, and I cannot recommend any award from the Fund.

CONCLUSIONS OF LAW

Upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that:

The Respondent violated §17-322(b)(4) of the Business Occupations Article by § 17-322(b)(4) of the Business Occupations Article by intentionally or negligently failing to disclose to any person with whom she dealt a material fact that the licensee knew or should have know about the Property;

The Respondent violated §17-322(b)(19) of the Business Occupations Article by advertising in a misleading or untruthful manner;

The Respondent violated § 17-322(b)(33) of the Business Occupations Article by violating a regulation adopted under this the Business Occupations title or a provision of the code of ethics; and

The Respondent violated COMAR 09.11.02.02D by failing to make reasonable efforts to ascertain all material facts concerning the subject property, in order to fulfill her obligation to avoid error, exaggeration, misrepresentation or concealment of material facts.

The Claimant did not suffered an actual loss subject to an award from the Fund under § 17-404 of the Business Occupations Article and COMAR 09.11.03.04.

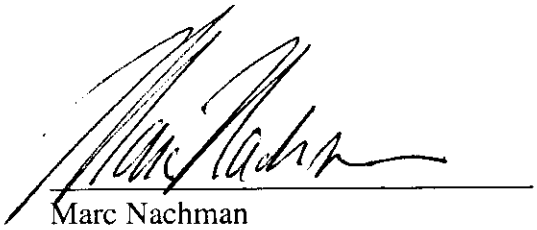
RECOMMENDED ORDER

I RECOMMEND that the Maryland Real Estate Commission:

ORDER that the Respondent's license be suspended for ninety days;

ORDER that the Claimant not be reimbursed from the Maryland Real Estate Guaranty Fund because she did not incur an actual loss that was compensable from the Fund; and

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



August 18, 2008
Date Decision Mailed

Marc Nachman
Administrative Law Judge

Doc #99216