

THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM * BEFORE WILLIAM C. HERZING,
OF DIANA CROCKETT * ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND REAL * OF THE MARYLAND OFFICE OF
ESTATE COMMISSION GUARANTY * ADMINISTRATIVE HEARINGS
FUND FOR THE ALLEGED * OAH No: DLR-REC-22-09-43595
MISCONDUCT OF * REC CASE NO: 2008-RE-244 G.F.
JAMELA PALMER *

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated September 2, 2010, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 29th day of September, 2010,

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, APPROVED;
- C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;

and,

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

MARYLAND STATE REAL ESTATE COMMISSION

SIGNATURE ON FILE

9-29-2010
Date

By: J. Nicholas D'Ambrosia, Commissioner

RE ON

CLAIM OF DIANA CROCKETT,
CLAIMANT
AGAINST THE MARYLAND
REAL ESTATE COMMISSION
GUARANTY FUND FOR
THE ALLEGED MISCONDUCT OF
JAMELA PALMER, AGENT,
REMAX ONE,
RESPONDENT

* BEFORE WILLIAM C. HERZING,
* ADMINISTRATIVE LAW JUDGE
* MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: DLR-REC-22-09-43595
* MREC NO.: 08-RE-244GF
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RECOMMENDED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On October 5, 2007, Diana Crockett (Claimant) filed a complaint with the Maryland Real Estate Commission (MREC) and also filed a claim against the MREC Guaranty Fund (Fund) for reimbursement for actual losses suffered as a result of alleged misconduct by the Respondent related to the Respondent's representation of the Claimant in a real estate sales transaction.

I held a hearing on the Claimant's Fund claim on June 21, 2010, at the Largo Government Center in Largo, Maryland. Md. Code Ann., Bus. Occ. § 17-408 (2004). Michael J. Conlon, Esquire, represented the Claimant. The Respondent represented herself and Assistant Attorney General Hope Sachs represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); COMAR 09.01.03 and 28.02.01.

ISSUE

Did the Respondent misrepresent that repairs had been made to property purchased by the Claimant and, if so, did the Claimant sustain an actual loss that is compensable by the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted fourteen exhibits on behalf of the Claimant, no exhibits on behalf of the Respondent and four exhibits on behalf of the Fund. I have attached a complete Exhibit List as an Appendix to this decision.

Testimony

The Claimant and the Respondent both testified on their own behalf. The Fund did not call any witnesses.

FINDINGS OF FACT

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

1. At all times relevant, the Respondent held a valid real estate license. Her license expired on October 31, 2008.
2. On March 13, 2007, the Claimant entered into a residential contract of sale to purchase property located at 1412 Nye Street, Capitol Heights, Maryland, 20743.
3. The Claimant was represented by the Respondent who was a sales agent for Remax One Realty.

4. The contract was contingent on an inspection of the property at the Claimant's expense. The Claimant had a home inspection completed on March 24, 2007. The inspection revealed the home was heated by a forced air natural gas furnace, approximately sixty years old and in extremely poor condition. The gas to the system was turned off so the inspector could not test the furnace.

5. The inspection of the crawl space revealed a drainage leak and standing water, no polyvinyl vapor barrier, and the sub-flooring was not insulated.

6. The Respondent prepared an addendum to the contract which called for the seller to repair defects noted in the home inspection, including waterproofing of the crawl space, installation of a polyvinyl vapor barrier, installation of vent screens, insulation of the sub-floor and repair of a waste vent pipe and leak under the bathroom sink. It further called for restoration of gas and evaluation of the furnace by a technician and replacement if needed.

7. The Claimant signed the addendum on March 26, 2007, but the Respondent did not give her a copy signed by the sellers until after closing. The Respondent advised the Claimant that the sellers had signed the addendum.

8. The copy of the addendum the Claimant received at settlement had handwritten changes to items 2, 9 and 11 that were not on the copy the Claimant signed and were not agreed to by the Claimant.

9. The Respondent did not obtain any verification that the repairs to the crawl space were completed or that the furnace had been evaluated according to the terms of the addendum.

10. The Respondent advised the Claimant that the repairs to the crawl space and the evaluation of the furnace were completed.

11. At the walkthrough following settlement the Claimant looked in the crawl space and saw that there was some insulation. The Respondent told the Claimant that the repairs to the crawl space had been done.

12. The Claimant did not start the furnace because it was May. When she did attempt to start the furnace it ran, but did not heat.

13. The Claimant had the furnace inspected by All-Pro Services. The inspection revealed that the heat exchanger was cracked and the furnace could not be operated safely.

14. The Claimant paid \$1,185.00 to replace the furnace.¹

15. The crawl space was not waterproofed and a vapor barrier was not installed.

16. The Claimant obtained three estimates to complete the waterproofing and vapor barrier installation but she had not had the repairs completed at the time of the hearing.

DISCUSSION

I find that the Claimant has shown that he is entitled to recover actual losses from the Fund. I have set out the reasons for my conclusions in detail below.

Claims for reimbursement from the Fund are governed by section 17-404 of the Maryland Business Occupations Article and COMAR 09.11.03.04, which state as follows:

§ 17-404. Claims against the Guaranty Fund.

(a) *In General.* -- (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;

¹ A portion of the cost to replace the furnace was covered by insurance. The Claimant is claiming the part that she paid.

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.

Md. Code Ann., Bus. Occ. & Prof. § 17-404 (2004).

.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;

(2) Is performed by an unlicensed employee of a licensed real estate broker or by a duly licensed real estate broker, associate broker, or salesperson; and

(3) Involves conduct for which a license is required by Business Occupations and Professions Article, Title 17, Annotated Code of Maryland.

COMAR 09.11.03.04.

The burden of proof rests with the claimant to establish the validity of his or her claim. Md.

Code Ann., Bus. Occ. & Prof. § 17-407(e) (2004).

It is undisputed that the Respondent was a licensed real estate salesperson and that the transaction involved real property in Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(i),(ii). Additionally, the evidence established that the Respondent committed acts involving misrepresentation which caused the Claimant to sustain an actual loss compensable by the Fund.

The Claimant testified that she obtained the Respondent's name from a friend and engaged her to represent her in the purchase of a home. The Respondent showed the Claimant the Nye Street property and on March 13, 2007, the Claimant entered into a contract of sale with the sellers. The contract contained a contingency clause which subject completion of the sale to a home inspection of the property. The Claimant hired HomeBiz to perform the inspection which was completed on March 24, 2007. The inspection report noted that the furnace was sixty years old and was forty-two years past its life expectancy. At the time of the home inspection, gas to the property was turned off and the furnace could not be tested. The inspection report further detailed the defects the inspector observed in the basement crawl space. There was standing water in the crawl space, there was no polyvinyl vapor barrier installed and the sub-flooring was not insulated.

The Claimant testified that the Respondent prepared an addendum to the contract which called for the seller to waterproof the crawl space, install a polyvinyl vapor barrier, vent screens and insulate the sub-floor. The addendum also required the seller to restore gas to the furnace and have it tested by an HVAC technician and replace it if necessary. Although the Claimant signed the addendum on March 26, 2007, the Respondent did not provide her with a copy. The Respondent advised the Claimant that the sellers had signed the addendum but it was not until after settlement that the Claimant received a copy. The copy she received had handwritten

alterations to several terms which were not on the document she signed and which she had not agreed to.

Most significantly, the Claimant testified that the Respondent represented to her that the repairs detailed in the contract addendum had been completed. The Claimant stated that during a walkthrough of the property after settlement she looked in the crawl space and saw some insulation. At that time the Respondent advised her that all of the repairs on the crawl space had been completed. In fact, the waterproofing had not been done and there was no polyvinyl vapor barrier and the sub-floor had not been insulated. The Claimant did not attempt to start the furnace during the walkthrough but when she did at a later time, it ran but did not heat. Upon inspection, All-Pro Services discovered that the heat exchanger was cracked and the furnace could not be operated.

The Respondent did not present any evidence to refute the Claimant's allegations of misrepresentation. She stated that she thought she gave the Claimant a copy of the addendum which she submitted to the sellers after the inspection. The Respondent testified that the sellers told her that they would send her invoices when the repairs were made. She admitted that she did not know if the furnace repairs were done at the time of settlement and stated she did not receive an invoice for furnace repairs until after the settlement. That invoice was only for repair of a missing furnace door and does not indicate that gas was restored and the furnace was tested. The Respondent further stated she received an invoice for insulation of the crawl space but she did not know if the waterproofing had been done. The only defense presented by the Respondent was that she was new to real estate sales and did not intentionally make misrepresentations to the Claimant. The Respondent's argument is not convincing. She knowingly told the Claimant that the sellers had agreed to the items on the addendum when they had made changes to the

document that was not presented to the Claimant for her approval. She told the Claimant that the repairs to the furnace had been done and that the crawl space defects had been corrected when, in fact, she had no verification or invoices that any of those items were complete. The Respondent's misrepresentations caused the Claimant to suffer an actual loss for costs to make the repairs to the crawl space and to replace the furnace.

I compute the Claimant's actual loss as \$6,295.00 which is the Claimant's cost to replace the furnace and the lowest of the three estimates she obtained to waterproof the crawlspace, insulate the sub-floor and install a vapor barrier. The Fund did not oppose the award.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent's misrepresentations of repairs to the furnace and the crawl space resulted in the Claimant sustaining an actual loss that is compensable by the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-404 (2004) and COMAR 09.11.03.04.

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Real Estate Commission:

ORDER, that the Claimant be reimbursed \$6,295.00 from the Maryland Real Estate Guaranty Fund to compensate for actual losses that she sustained because of the conduct of the Respondent, and further,

ORDER, that the Respondent be ineligible for any Maryland Real Estate Commission license until the Respondent reimburses the Fund for all monies disbursed under this Order plus annual interest of at least ten percent, as set by the Commission; Md. Code Ann., Bus Occ. & Prof. § 17-411(a)(2) (2004), and further,

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

September 2, 2010
Date Decision Issued

SIGNATURE ON FILE

William C. Herzing
Administrative Law Judge

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