

THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM * BEFORE STEPHEN J. NICHOLS,
OF MARY E. CARROLL * 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-22-08-14890
MISCONDUCT OF EMORY BOBO, * REC CASE NO: 2006-RE-306
REAL ESTATE SALESPERSON *

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated January 7, 2009, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 18th day of March, 2009,

ORDERED,

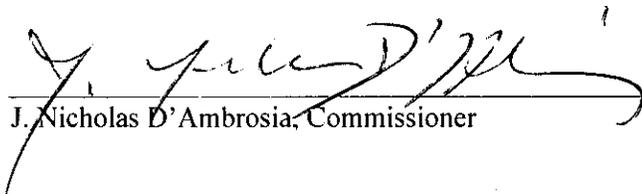
- A. That the Findings of Fact in the Recommended Decision be, and hereby are, AFFIRMED;
- B. That the Conclusions of Law in the Recommended Decision be, and hereby are, APPROVED;
- C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;

and,

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

MARYLAND STATE REAL ESTATE COMMISSION

2-18-2009
Date

By: 
J. Nicholas D'Ambrosia, Commissioner

**IN THE MATTER OF THE CLAIM
OF MARY E. CARROLL
AGAINST THE MARYLAND REAL
ESTATE COMMISSION GUARANTY
FUND FOR THE ALLEGED
MISCONDUCT OF EMORY BOBO,
LICENSED REAL ESTATE SALESPERSON**

*** BEFORE STEPHEN J. NICHOLS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
* OAH NO.: DLR-REC-22-08-14890
* REC NO.: 2006-RE-306**

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RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On March 14, 2006, Mary E. Carroll (Claimant) filed a complaint with the Maryland Real Estate Commission (MREC) and, on the same date, filed a claim against the Real Estate Commission Guaranty Fund (Fund) in the amount of \$6,000.00 for monetary losses incurred as a result of the alleged misconduct of Emory Bobo (Respondent), a licensed real estate salesperson.

On April 8, 2008, based upon the content of the complaint, the MREC issued an Order for Hearing. On August 18, 2008, the Office of Administrative Hearings (OAH) scheduled a hearing for December 18, 2008, at 10:00 a.m.

On December 18, 2008, the above-captioned case was heard before Stephen J. Nichols, Administrative Law Judge (ALJ), on behalf of the MREC. The hearing was conducted at the OAH located at 11101 Gilroy Road, Hunt Valley, Maryland. Kurt Wolfgang, Esquire, represented the Claimant. Hope M. Sachs, Assistant Attorney General, Office of the Attorney General, Department of Labor, Licensing & Regulation, represented the Fund. The Respondent failed to appear for the hearing 10:00 a.m. After waiting approximately thirty minutes, the hearing was convened.

On August 18, 2008, the OAH had mailed notice of the hearing to the Respondent by certified and regular mail to his last business address on file with the MREC. The notice advised the Respondent of the time, place and date of the hearing. At the time the notice was mailed, the Respondent was licensed by the MREC and was, therefore, required to keep his business address on record with that agency updated. The U. S. Postal Service returned a receipt for the certified mail reflecting that the notice had been received and signed for by a person other than the Respondent at his business address. The regular mail that was sent to the Respondent at his business address was returned to the OAH marked "RETURN TO SENDER, NOT DELIVERABLE AS ADDRESSED, UNABLE TO FORWARD."

On December 4, 2008, the OAH mailed a second notice of the hearing to the Respondent by certified and regular mail at two alternate addresses for the Respondent. The second notice also advised the Respondent of the time, place and date of the hearing. One of the alternate addresses was on record with the Motor Vehicle Administration as the Respondent's address (the Respondent is a licensed driver in this State). Records from the Maryland Department of Assessments and Taxation reflect that the Respondent still owns the residence at that address. The other alternate address was a mailing address that the Respondent had provided to a MREC

clerk over the telephone on August 7, 2008. The notices sent by regular mail to the two alternate addresses were not returned to the OAH.¹

“In Maryland, a finding that an individual properly mailed a letter raises a presumption that the letter ‘reached its destination at the regular time and was received by the person to whom it was addressed.’” *Bock v. Insurance Comm’r*, 84 Md. App. 724, 733, 581 A.2d 857, 861 (1990) quoting *Border v. Grooms*, 267 Md. 100, 104, 297 A.2d 81, 83 (1972), and *Kolker v. Biggs*, 203 Md. 137, 144, 99 A.2d 743, 746 (1953). Based on that presumption and that the December 4, 2008 notices sent by regular mail were not returned to the OAH, the notice of hearing sent by the OAH to the Respondent is deemed to have been received by him and provided him with notice of the instant hearing in a timely fashion.

Insofar as written notice of the hearing was sent to the Respondent at his last business address on file with the MREC and written notice was also mailed to all known additional addresses for the Respondent, the ALJ directed that the hearing proceed *in absentia*. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2004); Code of Maryland Regulations (COMAR) 09.01.02.05; COMAR 09.01.02.07.

The Administrative Procedure Act; the procedural regulations of the Department of Labor, Licensing and Regulation; and the OAH Rules of Procedure govern the procedure in this case. Md. Code Ann., State Gov’t §§ 10-201 through 10-226 (2004 & Supp. 2008); COMAR 09.01.02, COMAR 09.01.03, COMAR 09.11.03.02; COMAR 28.02.01.

¹ As of the date of the hearing, the U. S. Postal Service had not returned to the OAH any receipt for the two notices sent to the Respondent by certified mail on December 4, 2008.

ISSUES

The issues are whether the Claimant sustained an “actual loss” compensable by the Fund as the result of an act or omission of the Respondent within the meaning of section 17-404(a) of the Business Occupations and Professions Article of the Annotated Code of Maryland, and if so, the amount of the award.

SUMMARY OF THE EVIDENCE

Exhibits

The Fund submitted the following exhibits that were admitted into evidence:

Fund Ex. #1 - August 18, 2008 Notice of Hearing with a copy of an Order for Hearing and return receipts for certified mail

Fund Ex. #2 - August 18, 2008 Notice of Hearing with a copy of an Order for Hearing and a regular mail envelope returned to the OAH

Fund Ex. #3 - December 4, 2008 Notice of Hearing

Fund Ex. #4 - Affidavit of Steven Long with attachment

Fund Ex. #5 - MREC licensing information on the Respondent

Fund Ex. #6 - Copy of a MREC Complaint and Guaranty Fund Claim form

Fund Ex. #7 - Copy of an e-mail, dated Thursday, August 07, 2008 2:12 PM

The Claimant submitted the following exhibits that were admitted into evidence:

Claim Ex. #1 - Copy of a Residential Contract of Sale

Claim Ex. #2 - Copy of a General Addendum

Testimony

The Claimant testified in her own behalf and presented testimony from Ken D. Smith, her son. The Fund did not offer testimony.

FINDINGS OF FACT

After considering all of the testimony and exhibits, the ALJ finds, by a preponderance of the evidence, the following to be fact:

1. At all times relevant to this proceeding, the Respondent was licensed by the MREC as a real estate salesperson.
2. During early January 2006, the Claimant was interested in the possible purchase of a new residential property for herself and her grandchildren in Fort Washington, Maryland. The Claimant's son, who was acquainted with the Respondent and knew he was a real estate salesperson, gave one of the Respondent's business cards to the Claimant. The business card identified the Respondent as a real estate salesperson with Realty Executives.
3. The Claimant telephoned the Respondent's cell phone number on the business card and spoke with him regarding the purchase of a residential property. The Respondent told the Claimant that he had several properties available for sale in the Fort Washington area. The Respondent did not inform the Claimant that he had an ownership interest in any of the properties that he said were available for sale.
4. On or about January 20, 2006, the Claimant met the Respondent at 12407 Lundale Court, Fort Washington, Maryland (the property) in order to view the property.
5. The Respondent had prepared a Residential Contract of Sale (the contract) listing BMS LLC as the seller of the property. The Respondent had an ownership interest in BMS LLC, but he did not disclose that information to the Claimant.
6. On January 20, 2006, the Claimant told the Respondent that she was interested in purchasing the property, but she wanted to have an attorney review the contract that the Respondent had prepared before she signed it. The Respondent gave the Claimant a copy of the contract.

The Claimant gave \$5,000.00 in cash to the Respondent as a deposit on the purchase of the property. The Respondent signed a receipt acknowledging receiving that amount as a deposit.

7. Three days later, the Claimant changed her mind about purchasing the property. The Claimant telephoned the Respondent's cell phone number and spoke with him and advised that she was no longer interested in the purchase and asked for a return of the \$5,000.00 deposit. The Respondent told the Claimant that he was out of the State at that time, but he would return in a few days and give her back the deposit.
8. After waiting past the time the Respondent had indicated he would return to Maryland, the Claimant traveled to the Respondent's business office at Realty Executives located in Camp Springs, Maryland. Office personnel at Realty Executives informed the Claimant that the Respondent was unavailable as he was in a business meeting, but he would contact her once the meeting was over. The Claimant left the Realty Executives office.
9. After the Claimant left the Realty Executives office, the Respondent put a "block" on his cell phone to stop incoming telephone calls from the Claimant.
10. The Respondent did not contact the Claimant and has never returned to her the \$5,000.00 deposit.
11. On March 14, 2006, the Claimant filed a claim with the Fund.

DISCUSSION

The burden of proof at any hearing on a claim against the Fund is on the "claimant to establish the validity of the claim." Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2004). Section 17-404(a) of the Business Occupations and Professions Article governs all claims

brought against the Fund and sets forth criteria that must be established by the Claimant in order to obtain an award. In pertinent part, that section provides,:

§ 17-404. Claims against Guaranty Fund.

(a) (1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.

(2) A claim shall:

(i) be based on an act or omission that occurs in the provision of real estate brokerage services by:

1. a licensed real estate broker;
2. a licensed associate real estate broker;
3. a licensed real estate salesperson; 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(a) (2004). COMAR 09.11.03.04, *Claims Against the Guaranty Fund*, provides:

- 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.

At all times relevant, the Respondent was a licensed real estate salesperson. The Respondent acted as the seller's agent in the Claimant's negotiation on a possible purchase of the property. The Respondent's activities fall within the definition of providing real estate brokerage services. Md. Code Ann., Bus. Occ. & Prof. § 17-101(l)(1), (2), (3) (Supp. 2008).² The act(s) and omission(s) of the Respondent, complained of by the Claimant, relate to real estate located in Maryland. The Claimant has met the requirements of sections 17-404(a)(2) (i) & (ii) of the Business Occupations and Professions Article.

For the instant claim to be successful against the Fund, the act(s) and omission(s) of the Respondent must also constitute one or more of six prohibited actions specified in section 17-404(a)(2)(iii) of the Business Occupations and Professions Article.

² (l) "Provide real estate brokerage services" means to engage in any of the following activities:

(1) for consideration, providing any of the following services for another person:

- (i) selling, buying, exchanging, or leasing any real estate; or
- (ii) collecting rent for the use of any real estate;

(2) for consideration, assisting another person to locate or obtain for purchase or lease any residential real estate;

(3) engaging regularly in a business of dealing in real estate or leases or options on real estate;

.....

Md. Code Ann., Bus. Occ. & Prof. § 17-101(l) (Supp. 2008).

“‘Embezzlement’ is broadly defined as the fraudulent appropriation of another’s property by a person to whom it has been [e]ntrusted or into whose hands it has lawfully come” 29A C.J.S. *Embezzlement* § 2 (1992). “The gravamen of the offense is that money or other property was entrusted to someone who stood in a fiduciary relationship with the owner, and the fiduciary fraudulently and willfully appropriated the property to a use other than that intended.” *State v. Burroughs*, 333 Md. 614, 622, 636 A.2d. 1009, 1013 (1994). “The offense of embezzlement is complete whenever a person who has been entrusted with money or property forms an intent to convert it to his or her own use, and has possession with such intent.” 9 M.L.E. *Embezzlement* § 2 (2008) (citation omitted). “[Fiduciary capacity] is not restricted to technical or express trusts, but includes such offices or relations as those of an attorney at law, a guardian, executor or broker, a director of a corporation, and a public officer.” 9 M.L.E. *Embezzlement* § 3 (2008) (citation omitted). To make out a case of embezzlement it is necessary to show that the property belonged to someone other than the accused, that the accused acquired the property lawfully, the accused is properly deemed to have been in a fiduciary capacity with respect to the owner, and there was a conversion of the property by the accused with fraudulent intent.

BMS LLC was the seller of the property. Regardless of his ownership interest in BMS LLC, the Respondent acted as the seller’s agent in the Claimant’s negotiation to purchase the property. In at least one matter, the Respondent was in a fiduciary capacity with respect to the Claimant.³ Statutory requirements made the Respondent a fiduciary with respect to the Claimant in the acquisition and holding of her trust money. Md. Code Ann., Bus. Occ. & Prof. § 17–502 (2004); Md. Code Ann., Bus. Occ. & Prof. § 17–505 (Supp. 2008). Acting as the seller’s agent,

³ “In accepting employment as an agent, the licensee shall protect and promote the interests of the client . . . [t]his obligation of absolute fidelity to the client’s interest is primary, **but it does not relieve the licensee from the statutory obligations towards the other parties to the transaction.**” COMAR 09.11.02.02A (emphasis added).

the Respondent lawfully came into possession of the Claimant's \$5,000.00 deposit on the purchase of the property. The Respondent and/or BMS LLC had no legal right to claim any of the \$5,000.00 deposit as the Claimant had not signed the contract and, therefore, no legally enforceable contract to purchase the property had ever existed.⁴ All of the \$5,000.00 being held by the Respondent was rightfully the property of the Claimant. When the Claimant notified the Respondent that she had changed her mind and asked for a return of the deposit, the Respondent failed to remit any of the \$5,000.00. Given the passage of time, and the attendant circumstances established in the record, the ALJ has drawn a reasonable and permissible inference that the Respondent has converted the \$5,000.00 to his own use with the intent to deprive the Claimant thereof. The Claimant has established an embezzlement of her \$5,000.00 deposit by the Respondent. The Claimant has met the requirement of section 17-404(a)(2)(iii) of the Business Occupations and Professions Article.

The Claimant has provided documentary and testimonial evidence to support the instant claim against the Fund and has met the required burden of proof. The Claimant suffered the loss of her \$5,000.00 deposit that the Respondent lawfully obtained while acting as the seller's agent and then fraudulently converted to his own use. The Claimant, therefore, is entitled to reimbursement from the Fund for an actual loss in the amount of \$5,000.00.⁵

⁴ "No action may be brought on any contract for the sale or disposition of land or of any interest in or concerning land unless the contract on which the action is brought, or some memorandum or note of it, is in writing and signed by the party to be charged or some other person lawfully authorized by him." Md. Code Ann., Real Prop. § 5-104 (2003).

⁵ The Claimant's original claim against the Fund was for \$6,000.00. The March 14, 2006 Complaint and Guaranty Fund Claim form reads that the \$6,000.00 claim was based on "\$5,000 for return of [Claimant's] deposit, \$1,000 for attorney's fees." Fund Ex. #6. "The amount of compensation recoverable by a claimant from the [Fund] . . . shall be restricted to the actual monetary loss incurred by the claimant, but may not include monetary losses other than the monetary loss from the originating transaction. Actual monetary losses may not include . . . **any attorney's fees the claimant may incur in pursuing or perfecting the claim against the guaranty fund.**" COMAR 09.11.01.18 (emphasis added). The Claimant presented no evidence regarding her attorney fees as her attorney fees cannot be included in the calculation of her actual loss.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, the ALJ concludes, as a matter of law, that the Claimant has established an "actual loss" valued at \$5,000.00 based on embezzlement by the Respondent, a licensed real estate salesperson. Accordingly, the Claimant is entitled to prevail in her claim against the Fund in the amount of \$5,000.00. Md. Code. Ann., Bus. Occ. & Prof. § 17-404(a) (2004); COMAR 09.11.03.04; COMAR 09.11.01.18.

RECOMMENDED ORDER

On the basis of the foregoing Findings of Fact, Discussion and Conclusions of Law, it is **RECOMMENDED** that the Maryland Real Estate Commission:

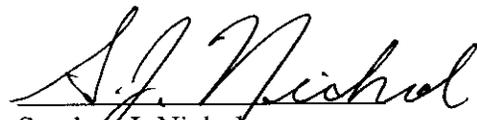
ORDER, that the Claimant be awarded the sum of \$5,000.00 from the Fund based on the claim filed on March 14, 2006 for actual losses sustained as a result of the misconduct of the Respondent; and that it further

ORDER that the Respondent be ineligible for any real estate broker's or salesperson's license until such time as the Respondent reimburses the Fund for all monies disbursed under this Order plus annual interest of ten percent (10%), pursuant to sections 17-411(a) and 17-412 of the Business Occupations and Professions Article of the Annotated Code of Maryland; and that it further

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

January 7, 2009
Date Decision Mailed

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#101800v1


Stephen J. Nichols
Administrative Law Judge