

MARYLAND REAL ESTATE COMMISSION

MARY T. NUNEMAKER

*

Claimant

* **MREC No. 2008-RE-871**

v.

* **OAH No. DLR-REC-22-08-41748**

**MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND
BASED UPON THE ALLEGED
VIOLATIONS OF MARK H.
SIMMONS, SR.**

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OPINION AND FINAL ORDER

The Claimant, Mary T. Nunemaker, filed Exceptions to the Proposed Order of September 30, 2009. On August 18, 2009, Administrative Law Judge A. J. Novotny, Jr. (“ALJ”) filed a Recommended Decision and Recommended Order in which he recommended that the Claimant’s claim against the Maryland Real Estate Commission Guaranty Fund (“Fund”) be denied.

On September 30, 2009, the Maryland Real Estate Commission (“Commission”) issued a Proposed Order that affirmed the ALJ’s Findings of Fact; approved the ALJ’s Conclusions of Law and adopted the ALJ’s Recommended Order.

A hearing was held by a panel of Commissioners consisting of Commissioners J. Nicholas D’Ambrosia, Marla S. Johnson and Surina A. Jordan on December 16, 2009. Peter Martin, Assistant Attorney General, represented the Commission. The Claimant was represented by Kenneth E. Crocken, Esquire. The proceedings were electronically recorded.

SUMMARY OF THE EVIDENCE

On behalf of the Commission, four exhibits, including the file related to the hearing before the ALJ which contained all exhibits admitted at the hearing before the ALJ, were entered into evidence. A transcript of the hearing before the ALJ was submitted to the Commission.

FINDINGS OF FACT

The Commission adopts Findings of Fact 1 through 7, 9 and 10. The Commission further finds that in the Circuit Court of Maryland for Carroll County, Case No. 06C04041917, the Claimant filed two counts under the Maryland Protection of Homeowners in Foreclosure Act., Md. Code Ann., Real Property Article, §7-301, *et seq.* (“MPHFA”) and the Maryland Secondary Mortgage Law, Md. Code Ann., Commercial Law Article, §12-401, *et seq.* The Defendants in this case were Mark Simmons, Cecilia Contreras and Michelle Carney. The case in the Circuit Court for Carroll County was based on the real estate transactions which occurred between the Claimant and the Defendants beginning in September, 2005 related to the Claimant’s property located at 706 Park Avenue, Mt. Airy, Maryland.

A Declaratory Judgment was entered in the Circuit Court case on February 28th, 2008. That Judgment states, in part:

“DECLARED, the Defendants Simmons and Contreras, acted as a foreclosure consultant without a valid written contract;

DECLARED, Defendants Simmons and Contreras, placed a lien against 706 Park Avenue, Mt. Airy, MD 21771, as partial payment for foreclosure consulting services and without of (sic) the voluntary consent of the Plaintiff;

DECLARED, the actions of the Defendants Simmons and Contreras, violate the Maryland Protection of Homeowners in Foreclosure Protection Act, Md. Code Ann., Real Prop. §7-301 *et seq.*;

DECLARED, the actions of the Defendants Simmons and Contreras, violate Maryland Secondary Mortgage Loan Law, Md. Code Ann., Comm. Law §12-401, *et seq.*;

DECLARED, that the Plaintiff is hereby RELEASED from a Deed of Trust, the Defendant Michelle Carney, Trustee, dated September 26, 2005, recorded in the Land Records of Carroll County, Liber 4607 Folio 137.

DECLARED, that the Defendants Simmons and Contreras, intentionally misrepresented material facts regarding payment of services and willfully violated the Maryland Protection of Homeowners in Foreclosure Protection Act, Md. Code Ann., Real Prop. §7-301, *et seq.*;

DECLARED, that by reason of the Defendants' Simmons and Contreras actions, the Plaintiff has sustained actual damages in the amount of One Hundred Fifty Thousand Ninety One Dollars, (\$150,091.00), and that the (sic) pursuant to Md. Code Ann., Real Prop. §7-320(c), the Plaintiff is hereby awarded treble damages in the amount of Four Hundred Fifty Thousand Two Hundred Seventy Three Dollars (\$450,273.00), jointly and severally against Defendants Mark Simmons and Cecilia Contreras;..."

As the basis for her claim against the Fund, the Claimant alleged that Mr. Mark Simmons, a licensed real estate professional, on or about September 2005, contacted Ms. Nunemaker regarding a foreclosure filed against Ms. Nunemaker's home, the herein subject property, 706 Park Ave. Mt. Airy, MD 21771. She alleged that Mr. Simmons convinced her to enter into a foreclosure rescue transaction, stating that it would help her

save her home. According to Ms. Nunemaker, Mr. Simmons represented that the transaction between Ms. Nunemaker and Mr. Attique Qamar was legal and that his compensation would be as outlined in the contract for sale. She alleged that Mr. Simmons, without her voluntary consent and through false pretenses, filed a Second Deed of Trust against the subject property in the name of an unregistered company, RETE Funding, run by Mr. Simmons and his partner Cecilia Contreras. The Claimant alleged that upon discovery of the Second Deed of Trust, she rescinded the transaction pursuant to the Maryland Protection of Homeowners in Foreclosure Act on February 8, 2006. She contended that the transaction was in violation of the Maryland Protection of Homeowners in Foreclosure Act and was illegal. She alleged that Mr. Simmons acted as a foreclosure consultant and took an interest in the property via the Second Deed of Trust as additional, undisclosed compensation. Further, she alleged that the Second Deed of Trust was obtained fraudulently, without the voluntary consent of the homeowner. As a result of the alleged misrepresentations by Mr. Simmons, the Complainant contended that she was unable to refinance the first deed of trust on her property, thereby causing her to lose the equity in the property.

For the purposes of a guaranty fund claim, the misconduct of the real estate salesperson must arise out of a real estate transaction involving real estate located in the 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, performed by a licensed real estate salesperson and involving conduct for which a license is required by the Business Occupations and Professions Article, Title 17, *Annotated Code of Maryland*.

Section 17-404, Business Occupations and Professions Article (“Bus. Occ. and Prof.”), Code of Maryland Regulations (“COMAR”) 09.11.03.04.

The Claimant argued that the Court’s Declaratory Judgment should be binding on the determination in regard to the Fund claim. Collateral estoppel is a doctrine which provides that when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties whether on the same or a different claim. See *Deitz v. Palogos*, 120 Md. App. 381, 395-396 (1998). As noted by the Court in *Pope v. School Commissioners of Baltimore City, et al.*, 106 Md. App. 578, 594 (1995), cert. denied, 342 Md. 116 (1996), the policy of precluding re-litigation of matters already fairly and fully litigated avoids multiple lawsuits, conserves judicial resources, and fosters reliance on judicial decisions by minimizing the chance of inconsistent decisions. The prior and current proceedings do not have to be the same; all that must be determined is that the fact or issue presently in question was decided at the prior proceeding. *Montgomery County v. Tamara A.*, 178 MdApp. 686, 698 (2008), reversed on other grounds 407 Md. 180 (2009).

Collateral estoppel applies if the following four questions are answered in the affirmative:

1. Was the issue decided in the prior adjudication identical to the one presented in the action in question?
2. Was there a final judgment on the merits?
3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Montgomery County v. Tamara A., 178 Md. App. 686, 697 (2008), reversed on other grounds 407 Md. 180 (2009) citing *Colandrea v. Wilde Lake Cmty. Ass'n*, 361 Md. 371, 391 (2000).

The issue before the Circuit Court as well as this Commission is whether the Respondent, Mark Simmons, Sr., a licensed real estate salesperson at the time of his interactions with the Complainant, engaged in fraudulent and illegal activities involving real estate located in Maryland while providing real estate brokerage services.. The Circuit Court found that the Respondent fraudulently placed a lien against 706 Park Avenue, Mt. Airey, MD as partial payment for foreclosure consulting services without the voluntary consent of the Complainant. The Court further found that the Respondent engaged in actions involving the property which violated the Maryland Secondary Mortgage Loan Law. The Court also declared that the Respondent intentionally misrepresented material facts regarding payment for services in regard to the property in violation of the Maryland Protection of Homeowners in Foreclosure Protection Act. In order to be eligible for payment from the Fund, the Complainant must prove by a preponderance of the evidence that she suffered an actual monetary loss as a result of the conduct of a licensed broker or salesperson providing real estate brokerage services involving a real estate transaction for real estate located in Maryland. Bus. Occ. and Prof. Article, §§17-404(a) and 17-407(e); COMAR 09.11.03.04. In addition to establishing the specific amount of the loss, the Complainant must also prove that the loss was the result of conduct which constituted theft, embezzlement, forgery, false pretenses,

fraud, or misrepresentation. The Circuit Court declared that the Respondent had engaged in misrepresentation regarding payment for services relating to the subject property and had violated two laws relating to real property: the Maryland Secondary Mortgage Loan Law and the Maryland Protection of Homeowners in Foreclosure Protection Act. Thus, the Commission finds that the issue decided before the Circuit Court for Carroll County was identical to the issue presented to the Commission by the Complainant in her Fund claim and a determination of the issue was essential to the judgment; namely, whether the Respondent, a licensed real estate salesperson, had engaged in fraudulent and illegal conduct involving real estate located in Maryland and owned by the Complainant which resulted in a monetary loss to the Complainant. The Circuit Court found that the Respondent engaged in fraudulent and illegal activity involving real estate owned by the Complainant and that the Complainant had suffered actual damages in the amount of \$150,091.00 as a result of the Respondent's conduct.

There was a final judgment on the merits issued by the Circuit Court for Carroll County. No appeal was taken by the Respondent.

The Complainant was the Plaintiff and Respondent was one of the Defendants in the case before the Circuit Court for Carroll County case. Thus, there is identity of parties in the Circuit Court case and the case before the Commission.

The Commission also finds that the Respondent was given a fair opportunity, after proper notice, to be heard on the issue but failed to appear before the Circuit Court or at the hearing before the ALJ.

The Commission finds that the Declaratory Judgment of the Circuit Court for Carroll County should be given collateral estoppel effect in this case on both the issue

of whether the Respondent engaged in fraudulent and illegal activity and on the issue of the actual damages sustained by the Complainant. The Commission further finds that the Claimant should be awarded \$25,000.00, the maximum allowed under the Fund, based on the fact that she sustained an actual loss of \$150,091.00. The monetary judgment in the case before the Circuit Court for Carroll County remains unpaid. However, the Commission finds that, in the event the Claimant is paid a sum in excess of \$150,091.00 by the Respondent or other Defendant in the Circuit Court case, the Claimant must refund to the Commission the excess received over \$150,091.00 up to an amount equal to the Guaranty Fund award made by the Commission.

CONCLUSIONS

Based upon the foregoing Findings of Fact, the Commission concludes, as a matter of law that:

1. Mark H. Simmons, Sr. was a licensed real estate salesperson at all times relevant to this matter.
2. The Claimant, Mary T. Nunemaker, suffered actual losses in excess of \$25,000 due to the fraudulent and illegal acts of Mark H. Simmons, Sr. in regard to the provision of real estate brokerage services to the Claimant relating to property located in Maryland.
3. The Respondent, Mark H. Simmons, Sr., was responsible for the losses, and was acting within the scope of his real estate salesperson's license when the losses occurred.
4. The Claimant, Mary T. Nunemaker, is entitled to recover \$25,000.00, the

maximum allowable award from the Fund, for the actual losses she suffered as a result of the fraudulent and illegal acts of Mark H. Simmons, Sr.

5. In the event the Claimant, Mary T. Nunemaker, receives funds in excess of her actual losses of \$150,091.00 as a result of payment of the currently unpaid judgment in Circuit Court for Carroll County case number 06C04041917, the Claimant must refund to the Commission the excess received over \$150,091.00 up to an amount equal to the Guaranty Fund award made by the Commission.

ORDER

The Exceptions of the Claimant having been considered, it is this 2nd day of January 2010 by the Maryland Real Estate Commission
ORDERED,

1. That the Claimant, Mary T. Nunemaker, be reimbursed Twenty-Five Thousand Dollars (\$25,000.00) from the Maryland Real Estate Guaranty Fund to compensate for the actual loss that she sustained because of the conduct of the Respondent, Mark H. Simmons, Sr.;

2. That in the event the Claimant, Mary T. Nunemaker, receives funds in excess of her actual losses of \$150,091.00 as a result of payment of the currently unpaid judgment in Circuit Court for Carroll County case number 06C04041917, the Claimant must refund to the Commission the excess received over \$150,091.00 up to an amount equal to the Guaranty Fund award made by the Commission; and

3. That the Respondent, Mark H. Simmons, Sr., be and hereby is ineligible for any license issued by the Maryland Real Estate Commission until the Maryland Real

Estate Guaranty Fund is reimbursed by the Respondent.

MARYLAND REAL ESTATE COMMISSION

By: Kathleen J. 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.

THE MARYLAND REAL ESTATE COMMISSION

MARY T. NUNEMAKER,	*	BEFORE A. J. NOVOTNY, JR.,
CLAIMANT v.	*	ADMINISTRATIVE LAW JUDGE
THE MARYLAND REAL ESTATE	*	OF THE MARYLAND OFFICE OF
COMMISSION GUARANTY	*	ADMINISTRATIVE HEARINGS
FUND FOR THE ALLEGED	*	OAH No: DLR-REC-22-08-41748
VIOLATIONS OF MARK H.	*	REC CASE NO: 2008-RE-871
SIMMONS, SR., RESPONDENT	*	

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated August 18, 2009, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 30th day of September, 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;

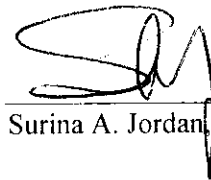
and,

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

MARYLAND STATE REAL ESTATE COMMISSION

9/30/09
Date

By:



Surina A. Jordan, Commissioner

MARY T. NUNEMAKER,

CLAIMANT

v.

THE MARYLAND REAL ESTATE

COMMISSION GUARANTY FUND

BASED UPON THE ALLEGED

VIOLATIONS OF MARK H.

SIMMONS, SR.,

RESPONDENT

*** BEFORE A. J. NOVOTNY, JR.,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH No.: DLR-REC-22-08-41748**

*** MREC No.: 08-RE-871**

*** * * * ***

RECOMMENDED DECISION

**STATEMENT OF THE CASE
ISSUE**

SUMMARY OF THE EVIDENCE

FINDINGS OF FACT

DISCUSSION

CONCLUSION OF LAW

RECOMMENDED ORDER

STATEMENT OF THE CASE

On June 18, 2008, Mary T. Nunemaker (Claimant) filed a claim against the Real Estate Commission (REC) Guaranty Fund (Fund) for monetary losses allegedly incurred by the Claimant as a result of the misconduct of Mark H. Simmons, Sr., (Respondent), a licensed real estate broker and salesperson.

On June 18, 2009, I held a contested case hearing at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland 21031. Md. Code Ann., Bus. Occ. and Prof. §§ 17-407(c)(2) and 408 (2004). The Claimant was present and represented by

Kenneth E. Crocken, Esquire. Kris King, Assistant Attorney General, represented the Agency.

The Respondent did not appear after being properly notified of the claim and the hearing.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2008); the procedural regulations of the Department of Labor, Licensing and Regulation, Code of Maryland Regulations (COMAR) 09.01.02, 09.01.03, and 09.11.03; and the Rules of Procedure of the Office of Administrative Hearings, COMAR 28.02.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted the following exhibits, which were admitted into evidence:

- Cl. Ex. #1 Declaratory Judgment, issued February 28, 2008
- Cl. Ex. #2 Deed, issued August 14, 1984
- Cl. Ex. #3 Residential Contract of Sale, dated September 22, 2005
- Cl. Ex. #4 Residential Contract of Sale, Addendum, dated September 22, 2005
- Cl. Ex. #5 Option to Purchase Real estate, dated September 30, 2005
- Cl. Ex. #6 Rental Agreement, dated September 30, 2005
- Cl. Ex. #7 Respondent's business card
- Cl. Ex. #8 Second Deed of Trust, dated September 26, 2005
- Cl. Ex. #9 Real property tax assessment for July 1, 2008

The Fund submitted the following exhibits, which were admitted into evidence:

Fund Ex. #1 Notice of Hearing, dated March 6, 2009

Fund Ex. #2 Order for hearing, dated October 31, 2008

Fund Ex. #3 Licensing information for Respondent, dated June 17, 2009

Fund Ex. #4 Notice of Undeliverable Mail

Fund Ex. #5 REC Claim form, received June 18, 2008, with attachments

Testimony

The Claimant testified on her own behalf. The Fund did not present any testimony.

FINDINGS OF FACT

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

1. At all times relevant, the Respondent was a licensed real estate broker or salesperson, number 579852. The license expired April 23, 2007 and has not been renewed.
2. In latter 2005, the Claimant entered into a contact with the Respondent to sell her home located at 706 Park Avenue, Mt. Airy, Maryland, which was under threat of foreclosure.
3. The Claimant desired to sell her house, but to thereafter rent it back from the buyer.
4. The Claimant signed a Second Deed of Trust on her property to Michelle Carney on September 26, 2005. The Second Deed of Trust was arranged by the Respondent.
5. On September 22, 2005, the Claimant signed a contract of sale presented by the Respondent. The proposed buyer was Attique Qamar. The sale price was \$369,900.00. The settlement was to be December 23, 2005.
6. The sale was never consummated and the Claimant continued to reside in the house.

7. The Claimant's house was ultimately foreclosed.
8. The Claimant filed suit against the Respondent and two other individuals in Circuit Court of Maryland for Carroll County based upon the Second Deed of Trust.
9. On February 28, 2008, the Court issued a Declaratory Judgment, based upon the Respondent's default, and found that the Claimant (then the Plaintiff), sustained actual damages in the amount of \$150,091.00.
10. The Claimant filed the REC Fund claim to recover part of the court judgment.

DISCUSSION

In order to establish eligibility for any payment from the Fund, the Claimant must prove by a preponderance of the evidence that she suffered an actual monetary loss as a result of the conduct of a licensed broker or salesperson providing real estate brokerage services involving a transaction concerning real estate in Maryland. Md. Code Ann., Bus. Occ. and Prof., § 17-404(a) and 17-407(e) (2004); COMAR 09.11.03.04. The Claimant must establish not only the specific amount of the loss, but also that the loss was the result of conduct which constituted theft, embezzlement, forgery, false pretenses, fraud, or misrepresentation.

Section 17-404 of the Business Occupations Article governs all claims brought against the Fund, and sets forth criteria that must be satisfied by the Claimant in order to obtain reimbursement. That section provides 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;
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.

COMAR provides, at 09.11.03.04, the following:

Claims Against the Guaranty Fund.

A Guaranty Fund claim shall be based on 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 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.

Based upon the Respondent's conduct in this case, I conclude the Claimant was *probably* the victim of fraud and misrepresentation. However, while I conclude that the Claimant was probably the victim of fraud or misrepresentation, I further conclude that the Claimant has failed to prove any monetary loss and her claim must be dismissed.

The Claimant is relying heavily on the Court's Declaratory Judgment (Cl. Ex. #1) as either being *res judicata* or collateral estoppel. She believes that I must accept the Court's declaration as facts that are binding on this determination.

The doctrine of *res judicata*, or claim preclusion, has been defined in Maryland by the Court of Appeals, as follows:

A judgment between the same parties and their privies is a final bar to any other suit upon the *same cause of action*, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters *which with propriety could have been litigated* in the first suit.

Rowland v. Harrison, 320 Md. 223, 229 (1990); *Warner v. German*, 100 Md. App. 512, 518, 642 A.2d 239 (1994).

The doctrine of collateral estoppel, or issue preclusion, has also been defined by the Court of Appeals, as follows:

“When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”

Murray Int’l Freight Corp. v. Graham, 315 Md. 543, 547 (1989) (quoting Restatement (Second) of Judgments § 27 (1982)) .

The court in *Murray* addressed the purpose behind the principles of *res judicata* and collateral estoppel when it stated,

As a matter of general policy, the law ordinarily precludes the relitigation of matters that have been fully and fairly litigated and finally decided between parties, by a tribunal of competent jurisdiction. This policy avoids “the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibilities of inconsistent decisions.”

Id.

The original litigation involved a civil lawsuit filed by the Claimant in Circuit Court and appears¹ to be directed to the Second Deed of Trust (Cl. Ex. #8). The instant matter is an REC Fund proceeding, appearing to be focusing on the failed real estate sale. As the original lawsuit

¹ Conspicuous by its absence is the original pleading that the Claimant filed in the Circuit Court.

and the current proceeding are not identical cases, the principle of *res judicata* does not govern this matter. Therefore, the analysis here focuses on whether the doctrine of collateral estoppel binds my determination of facts in the REC Fund claim.

The issues to be determined in considering whether collateral estoppel warrants dismissal of the Fund proceeding include the following:

1. Whether there was identity of the parties;
2. Whether the issue of fact or law was actually litigated in the earlier proceeding;
3. Whether the issue was essential to the earlier judgment; and
4. Whether the judgment was final and could be appealed.

Murray Int'l, 315 Md. at 549-550.

A similar analysis for collateral estoppel was considered by the Court of Appeals in *Washington Suburban Sanitary Commission v. TKU Associates*, 281 Md. 1, 18-19 (1977). In that case, the court considered whether the issues in the current and prior proceedings were identical; whether there was a final judgment on the merits; whether the parties in the current and prior litigation were the same, or in privity; and whether the party was given a fair opportunity to be heard on the issues.

Parties

In the instant matter, both the Claimant and Respondent were parties to the original lawsuit and they are also parties in the current REC proceeding before OAH. In the original suit, the Claimant was the plaintiff and sued several defendants, including the Respondent in Circuit Court. The Claimant filed a Fund claim against the Respondent alone (Fund Ex. #5) in which she seeks \$25,000.00 from the Fund in accordance with the statute. Md. Code Ann., Bus. Occ. & Prof. § 17-404 (1995). Consequently, I conclude that the parties in the trial in Circuit Court and

in the Fund proceeding are the same, and could satisfy that element of the collateral estoppel defense.

Issues

The next question concerns whether the issues in the original suit and the instant Fund proceeding are the same, were actually litigated in the earlier proceeding, and were essential to the earlier judgment. The Circuit Court Declaratory Judgment (Cl. Ex. #1) is against several defendants, including the Respondent. However, Circuit Court Declaratory Judgment only addresses the Second Deed of Trust (Cl. Ex. #8). It makes no mention of a contract of sale, or contract between the Claimant and Respondent, other than relating to the Second Deed of Trust. The Declaratory Judgment makes it clear that the Claimant's "actual damages" relate to the Defendants' actions in regard to the Second Deed of Trust (Cl. Ex. #8) in violation of two sections of law identified as the Maryland Protection of Homeowners in Foreclosure Act and the Maryland Secondary Mortgage Loan Law. Md. Code Ann., Real Prop. §§ 7-301 through 7-325 (Supp. 2008); Md. Code Ann., Comm. Law §§ 12-401 the 12-415 (2005), respectively. The Court utilized section seven of the Real Property Law to award "treble" damages. Md. Code Ann., Real Prop. 7-320(c) (Supp. 2008). It is quite apparent that nothing is even mentioned in the Court's Declaratory Judgment about the Respondent acting as a real estate agent or the failed property sale.

Thus, I conclude that the issues, the underlying facts and circumstances that the Claimant raised and litigated at the trial in Circuit Court are not the exactly the same as those that the Claimant has raised and attempted to litigate in this Fund proceeding. Therefore, I am not bound to accept the Circuit Court's declarations as facts and conclude that the Claimant must prove her claim.

I found the Claimant to be a totally unreliable, inconsistent and unpersuasive witness. Her memory on any relevant matter was virtually nil. She complained that the sale of the Mt. Airy property did not go through and because of that failed sale she lost the property to foreclosure. She could not remember when the property was lost to foreclosure, or how long she lived in it after the sale failed. She opined that she continued to reside there until late 2007. She could not remember whether it was auctioned or how it was sold. She became evasive and despite prompting, could not remember and changed her mind back and forth, whether she or the Respondent actually cancelled the sale, which was originally scheduled for settlement on December 23, 2005.

In contrast to her initial complaint that she lost the house to foreclosure because of the failed sale, the Claimant next argued, as was the basis of the Court's Declaratory Judgment, that she lost the house because of the Second Deed of Trust. The Claimant complained that she could not refinance, in lieu of selling the property because of the Second Deed of Trust, but could not remember when or who advised her that she could not refinance. She stated repeatedly that she did not take out the Second Deed of Trust, and that she did not even know about it until she tried to refinance, but concedes that it carried her signature. She also admitted that she did not always read documents given to her to sign. Based upon her poor memory and evasiveness, I conclude that it is just as likely that she does not remember discussing the Second Deed of Trust with the Respondent, as that he did not present it to her but somehow got her signature.

The Claimant opined that her property was worth \$400,000.00 at the time (latter 2005), but only presented a 2007 tax assessment for \$344,150.00. Moreover, she did not explain why, if she felt that the property was worth \$400,000.00, she signed a contract of sale for \$369,900.00, or how the Respondent is at fault for that. Additionally, although there was at least one attempt

to refinance, the Claimant has not mentioned why there were no further attempts to sell the property after the September 22, 2005 contract failed, and before the foreclosure took place in 2007.

It appears that the Claimant was could easily have been misled at some point by the Respondent, but it is just speculation. Although insisting that it was the Respondent's fault that she lost her Mt. Airy house, and that it was (or was not, depending upon which part of her testimony is more credible) the Respondent's fault that the contract of sale was not completed, the Claimant has not established that she suffered any monetary loss compensable from the Fund. The Claimant, by both her testimony and via the Declaratory Judgment (Cl. Ex. #1), has not presented me with any figures or specifics for me to even attempt to calculate an actual loss. Even though the Court made a declaration of actual loss, as explained above, I cannot just accept that bare declaration.

Moreover, even with the Court's declaration, I cannot make any determination of actual loss because I have no idea whether any or all of the "actual damages" as found by the Court equate to actual losses as envisioned in Section 17-404 of the Business Occupations Article. But, even if I were to accept the Court's declarations as binding, which I do not, I still could not adequately determine actual losses based upon the record before me. Although the Claimant received a judgment in the amount of \$450,273.00, that amount is the treble damages, as available under the statute. Md. Code Ann., Real Prop. § 7-320(c) (Supp. 2008). Even assuming, although I do not, that actual damages in court equate to actual losses under the Fund, I have no information what, if any of the court's award of actual damages, as actual losses, remains unpaid. While the Claimant may wish to enforce the Court Declaratory Judgment via the Fund, she has not shown that the first \$25,000.00, or any part of the Court's declaration of actual damages is

unpaid. For all of the above reasons, I simply cannot make any award recommendations.

CONCLUSION OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant did not show that she suffered a loss that is recoverable from the Real Estate Guaranty Fund as a result of misconduct by the Respondent during the time that he was a licensed real estate broker and salesperson. 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's claim against the Real Estate Guaranty Fund be denied, and that it further

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

August 18, 2009
Date Decision Mailed

A. J. Novotny (RAB)
A. J. Novotny, Jr.
Administrative Law Judge

AJN/tc
#107468

MARY T. NUNEMAKER,

CLAIMANT

v.

THE MARYLAND REAL ESTATE

COMMISSION GUARANTY FUND

BASED UPON THE ALLEGED

VIOLATIONS OF MARK H.

SIMMONS, SR.,

RESPONDENT

*** BEFORE A. J. NOVOTNY, JR.,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH No.: DLR-REC-22-08-41748**

*** MREC No.: 08-RE-871**

*** * * * ***

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted the following exhibits, which were admitted into evidence:

- Cl. Ex. #1 Declaratory Judgment, issued February 28, 2008
- Cl. Ex. #2 Deed, issued August 14, 1984
- Cl. Ex. #3 Residential Contract of Sale, dated September 22, 2005
- Cl. Ex. #4 Residential Contract of Sale, Addendum, dated September 22, 2005
- Cl. Ex. #5 Option to Purchase Real estate, dated September 30, 2005
- Cl. Ex. #6 Rental Agreement, dated September 30, 2005
- Cl. Ex. #7 Respondent's business card
- Cl. Ex. #8 Second Deed of Trust, dated September 26, 2005
- Cl. Ex. #9 Real property tax assessment for July 1, 2008

The Fund submitted the following exhibits, which were admitted into evidence:

Fund Ex. #1 Notice of Hearing, dated March 6, 2009

Fund Ex. #2 Order for hearing, dated October 31, 2008

Fund Ex. #3 Licensing information for Respondent, dated June 17, 2009

Fund Ex. #4 Notice of Undeliverable Mail

Fund Ex. #5 REC Claim form, received June 18, 2008, with attachments