

BEFORE THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM *
OF SHERYL SILVERN, *
CLAIMANT *
AGAINST THE MARYLAND REAL * CASE NO. 15-RE-382 GF
ESTATE GUARANTY FUND, * OAH NO. DLR-REC-22-17-07826
FOR THE ALLEGED MISCONDUCT *
OF FELIX BUCHANAN, RESPONDENT *

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated August 28, 2017, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 26th day of October, 2017

ORDERED,

A. That the Findings of Fact in the recommended decision be, and hereby are, **AMENDED** as follows:

32. The Respondent owes the Claimant an additional \$10,324.94, representing rent and the security deposits for Properties 678 and 690 that the Respondent failed to remit to the Claimant as required by the two management agreements.

33. The Claimant sustained a monetary loss in the amount of \$10,324.94 as a result of the Respondent's conduct.

B. That the Conclusions of Law in the recommended decision be, and hereby are, **AMENDED** as follows:

Based on the Findings of Facts and Discussion, I conclude as a matter of law that the Claimant sustained an actual loss, compensable by the Fund, due to an act or omission of the Respondent in which money or property was obtained from the Claimant by embezzlement and misrepresentation in the provision of real estate brokerage services. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(iii) (Supp. 2016).

I further conclude as a matter of law that the amount of award that the Claimant is entitled to receive from the Fund is \$10,324.94.

C. That the Recommended Order in the recommended decision be, and hereby is, **AMENDED** as follows:

ORDERED:

1. That the claim of Sheryl Silvern against the Real Estate Guaranty Fund is **GRANTED**;
2. That the Claimant, Sheryl Silvern, shall be reimbursed from the Real Estate Guaranty Fund in the amount of **Ten Thousand Three Hundred Twenty-Four Dollars and Ninety-Four Cents (\$10,324.94)**; and

3. That all real estate licenses held by the Respondent, Felix Buchanan, are **SUSPENDED** and the Respondent is ineligible for any real estate license until the Respondent has repaid any money paid from the Real Estate Guaranty Fund pursuant to this Order plus annual interest as prescribed by law.

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

E. Pursuant to § 10-220 of the State Government Article, the Commission has reviewed the factual findings, conclusions of law and recommended order of the Administrative Law Judge (ALJ) and finds that modifications are necessary. Specifically, the Commission finds that the evidence in the record supports a conclusion that the Claimant is owed a total of \$10,324.94 from the Guaranty Fund (Fund), rather than the \$4,520.00 that the ALJ determined to be the Claimant's actual loss.

An agency may delegate to the Office of Administrative Hearings (OAH) the authority to issue proposed or final findings of fact. Md. Code Ann., State Government (SG) Article, § 10-205(b)(1). The Commission has delegated to OAH the authority to issue *proposed* findings of fact. The Commission is required to review OAH's proposed findings, conclusions, and order, and issue a proposed decision, which "may include the Office's proposed findings . . . with or without modification." SG § 10-220(c)(1);

see also Code of Maryland Regulations (COMAR) 09.01.03.08D. Therefore, the Administrative Procedure Act clearly allows the Commission to amend the findings of fact upon receipt of a proposed order from OAH.

The Commission acknowledges that, ordinarily, it will defer to findings of fact made by an ALJ and limit its review of a proposed decision to whether those facts support the legal conclusions reached by the ALJ. This is in keeping with the principle of comity; in other words, it is done out of deference to the ALJ's role as the fact finder, rather than as a matter of right. This case presents a rare occasion where the Commission disagrees with the weight given by the ALJ to certain evidence in the record. The Commission does not take issue with the ALJ's decision to allow certain evidence to be admitted; rather, it disagrees with the probative value given to certain evidence, as explained further below.

The Commission agrees with the ALJ's legal conclusion that the Claimant's Affidavit Judgment entered by the District Court of Maryland for Baltimore County should not be given collateral estoppel effect. After review of applicable case law in Maryland, the Commission agrees that collateral estoppel does not apply to an issue that was not "actually litigated". *John Crane, Inc. v. Puller*, 169 Md. App. 1, 34-37 (2006) (holding that the application of collateral estoppel, or issue preclusion, is dependent on

whether the issue was "actually litigated" and summarizing Maryland case law regarding what "actually litigated" means). An affidavit judgment is a type of default judgment that is allowed by the Rules of Civil Procedure governing District Court actions. See Md. Rule 3-306. Since, by their very nature, default judgements are entered in uncontested cases, the issue of the proper amount owed by the Respondent/Defendant to the Claimant/Plaintiff was not "actually litigated", and the amount awarded pursuant to the affidavit judgment does not have collateral estoppel effect in this proceeding.

Since collateral estoppel does not apply to preclude the re-litigation of the issue of the amount owed by the Respondent/Defendant to the Claimant/Plaintiff, the Claimant has the burden of proof to establish the amount of actual loss. See Md. Code Ann., Business Occupations and Professions Article (BOP), § 17-407(e). The standard of proof in a Fund hearing is the preponderance of the evidence. See SG § 10-217.

The Commission concludes that the Claimant has met her burden of proof and demonstrated that the Respondent owes her a total of \$10,324.94, consisting of the \$14,852.531 documented in Claimant's Exhibits 2 and 3, less the \$947.59 that had to be subtracted from Claimant's Exhibits 2 and 3 because certain amounts in the spreadsheets are not compensable by the Fund, less the \$3,580.00

that the Claimant acknowledged receiving from the Respondent in Claimant's Exhibit 10.

The Commission reaches its conclusion as to the amount owed by giving more weight to Claimant's Exhibits 2 and 3 than was given by the ALJ. These Exhibits consist of two spreadsheets (Spreadsheets) showing a month-by-month breakdown of the amount owed to the Claimant by the Respondent for Property 678 and Property 690. The Spreadsheets have columns showing additional fees incurred by the Claimant. The Spreadsheets also have columns showing the amount paid to the Claimant each month. The Spreadsheets show a total amount owed to the Claimant by the Respondent based on the aggregated monthly totals. The Claimant testified that she hired Jessica Greenstein, described as a forensic accountant, to help compile bank data regarding the two properties in order to ascertain the total amount owed by the Respondent.

The ALJ found that the Spreadsheets were insufficiently reliable to form the basis of an award from the Fund. The ALJ's conclusion regarding the reliability of the Spreadsheets was based on the fact that: (1) Jessica Greenstein did not testify at the hearing; (2) the Spreadsheets are not certified, not on letterhead, and not signed; (3) the Claimant did not describe Jessica Greenstein's qualifications or her methodology; and (4) the Claimant did not identify with reasonable particularity the underlying documentation that was used as the basis of the

calculations in the Spreadsheets.

The Commission finds the Spreadsheets reliable. The Claimant testified that the calculations from the spreadsheet were based on her bank data. There is nothing in the record that casts any doubt on the accuracy or reliability of that bank data. The Spreadsheets include precise dates as to when the Respondent made payments, as well as precise amounts that were paid by the Respondent to the Claimant on those dates certain. The amount owed as commission to the Respondent was subtracted from the monthly amount owed, consistent with the management agreements. Other management-related expenses that the Respondent incurred on the Claimant's behalf were also subtracted from the monthly amount owed for certain months. Based on the above considerations, the Commission concludes that the Spreadsheets are sufficient to meet the Claimant's burden of proof under the Fund statute and the Administrative Procedure Act with respect to the amount owed by the Respondent to the Claimant.

The Commission does not find that the probative value of the Spreadsheets is reduced in any way by the fact that Claimant did not call Jessica Greenstein to testify at the hearing. The Commission is able to understand the Spreadsheets without the benefit of Jessica Greenstein's testimony. If anything, Jessica Greenstein's testimony may have bolstered the probative value of the evidence by potentially revealing with more specificity the

source of the underlying data in the Spreadsheets. However, Jessica Greenstein's testimony is not a prerequisite to giving the Spreadsheets probative value, since the Claimant testified that her bank records were the source of the data in the Spreadsheets. It was not necessary for the Claimant to describe Jessica Greenstein's qualifications or her methodology, as the Spreadsheets are understandable by the average lay person. Similarly, the fact that the Spreadsheets are not certified, are not on letterhead, and are not signed does not diminish in any way the probative value of the evidence, since the content of the Spreadsheets is understandable by the average lay person.

In finding that the Claimant's actual loss was in the amount of \$4,520.00, the ALJ gave probative effect to the Respondent's statements regarding the amount that he owed to the Claimant. The Respondent made three separate statements regarding the amount he owed: (1) in a written letter, Claimant's Exhibit 9, he admitted owing \$9,100.00; (2) at the hearing, he admitted owing \$9,900.00; and (3) at the hearing, during closing argument, he admitted owing \$8,100.00. The ALJ gave weight to the final statement of the Respondent at the hearing, and found that he owed \$8,100 based on that admission.

The Commission does not give any probative value to the Respondent's statements regarding the amount he owed to the Claimant. Most importantly, the amount owed, according to the

Respondent, has changed over time. In fact, the amount owed according to the Respondent changed twice during the course of the hearing. This stands in contrast to the Claimant's more precise accounting from the Spreadsheets regarding the amount owed, which has not changed over time. Additionally, the Respondent did not present any documentary evidence or testimony regarding the amounts paid by the Respondent to the Claimant during the course of their engagement. This stands in contrast to the Spreadsheets, which contain a detailed accounting of the amounts paid by the Respondent pursuant to the management agreements.

The record, particularly Claimant's Exhibits 9a-9d, demonstrates that the Respondent has been engaged in a pattern and practice of misleading the Claimant as to his intention and ability to pay back the full amounts owed, primarily by either paying or promising to pay a part of the total past due amount and simultaneously promising to pay the remaining balance in the future, and thereby creating confusion as to the application of payments and the amount owed. The Commission will not allow the Respondent to profit from the confusion he has caused and therefore gives no weight to his statements regarding what he owes to the Claimant.

Finally, the Commission finds that the total amount awarded to the Claimant must be reduced to reflect certain amounts that were included in the Spreadsheets, but are not compensable by the Fund.

Under the Fund statute and regulations, the amount of compensation recoverable from the Fund is limited to actual monetary losses attributable to the originating transaction. BOP § 17-404(a); COMAR 09.11.01.18.

The Spreadsheets include additional amounts, other than the rent amounts owed to the Respondent pursuant to the terms of the management agreements, which the Claimant is seeking to recover from the Fund. There are three additional types of monetary losses that are included in the total amount owed to the Claimant according to the Spreadsheets: (1) Non-Sufficient Funds (NSF) charges attributable to a check provided by Respondent that bounced; (2) charges for forensic accounting; and (3) security deposits.

The Commission concludes that the NSF charges and charges must be excluded, but that the security deposits may be included. There is no evidence or testimony in the record to support an award of the NSF fees. On their face, these fees are not attributable to the embezzlement of funds that constitutes the basis of the claim against the Fund. The charges for forensic accounting are similarly not attributable to the embezzlement of funds. The Claimant was not forced to incur these charges as a result of the embezzlement of funds; rather, she chose to do so in order to assist in proving her damages in the District Court action. In this way the charges for forensic accounting are similar to

attorney's fees that a claimant may incur in pursuing or perfecting a claim against the Fund, which are not compensable from the Fund under Commission regulations. COMAR 09.11.01.18. The security deposits are attributable to the embezzlement of funds that forms the basis of the claim, and therefore will be included. However, the ALJ found that the security deposit for Property 678 was \$1,800, whereas the Spreadsheets indicate a total of \$2,311.59 owed to the Claimant for "Security Deposit Plus Interest Since 2011". The Commission concludes that \$1,800 is the proper amount owed to the Claimant for the security deposit for Property 678, and will reduce the total award accordingly.

To summarize, the Commission finds that the total of \$14,852.53 from the Spreadsheets must be reduced by the following amounts:

NSF Fees - \$36.00 (\$18 + \$18)

Forensic Accounting Fees - \$400.00 (\$200 + \$200)

Security Deposit for Property 678 - \$511.59 (\$2,311.59 - \$1,800)

This leaves a total of \$13,904.94. This amount is reduced further by the \$3,580.00 that the Claimant admitted receiving from the Respondent for a total award of \$10,324.94.

F. 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.

SIGNATURE ON FILE

Maryland Real Estate Commission

SIGNATURE ON FILE

<p>IN THE MATTER OF THE CLAIM OF</p> <p>SHERYL SILVERN,</p> <p>CLAIMANT</p> <p>v.</p> <p>THE MARYLAND REAL ESTATE</p> <p>COMMISSION GUARANTY FUND</p> <p>FOR THE ALLEGED MISCONDUCT</p> <p>OF FELIX BUCHANAN, #05-588064,</p> <p>RESPONDENT</p>	<p>* BEFORE ROBERT B. LEVIN,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* </p> <p>* </p> <p>* </p> <p>* </p> <p>* OAH No.: DLR-REC-22-17-07826</p> <p>* </p> <p>* MREC No.: 15-RE-382GF</p> <p>* </p>
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PROPOSED DECISION

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

STATEMENT OF THE CASE

On or about February 22, 2017, Sheryl Silvern (Claimant) filed a claim seeking reimbursement from the Maryland Real Estate Commission (the REC) Guaranty Fund (the Fund) for monetary losses she allegedly suffered as a result of the conduct of Felix Buchanan (Respondent) who at all relevant times was licensed as a real estate salesperson in the State of Maryland. The REC ordered that the Claimant should have a hearing to demonstrate her eligibility for an award from the Fund, and on March 13, 2017, the REC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

The OAH scheduled the hearing for June 22, 2017, at the OAH office in Hunt Valley, Maryland. A Notice of Hearing was sent to the parties on April 27, 2017.¹ On June 22, 2017, I convened the hearing as scheduled. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2010). The Claimant appeared and represented herself. The Respondent represented himself. The Fund was represented by Hope M. Sachs, Assistant Attorney General.

Procedure is governed by the contested case provisions of the Administrative Procedure Act, the REC procedural regulations, and the OAH Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.11.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss, compensable by the Fund, due to an act or omission of the Respondent in which money or property was obtained from the Claimant by theft, embezzlement, false pretenses, or forgery, or an act or omission that constitutes fraud or misrepresentation in the provision of real estate sales services, and if so,
2. What amount of award is the Claimant entitled to receive from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Claimant:

- Cl. Ex. # 1 - Email from Sean O'Keefe to Doug and Sheryl Silvern, dated June 14, 2017, with attached Retainer agreement, dated August 14, 2014
- Cl. Ex. # 2 - Spreadsheet titled "Forensic Accounting" for 690 Luthardt Road, Middle River, Maryland 21220, dated August 10, 2014
- Cl. Ex. # 3 - Spreadsheet titled "Forensic Accounting" for 678 Luthardt Road, Middle River, Maryland, dated August 10, 2014

¹ On June 13, 2017, the Respondent requested a postponement due to a medical appointment regarding his daughter, which was scheduled for the same day as the hearing. Subsequently, Respondent informed OAH that the appointment had been rescheduled. On June 20, 2017, the OAH denied Respondent's postponement request.

- Cl. Ex. # 4 - District Court of Maryland Complaint, with attached trial date notices, notices of summonses returned unserved, and request for summons
- Cl. Ex. # 5 - Property Management Agreement between Doug and Sheryl Silvern and Jaylix Property Management, LLC for 678 Luthardt Road for the period June 2011-June 2012, dated May 23, 2011
- Cl. Ex. # 6 - Residential Lease Agreement between The Jaylix Group and Lisa Hopkins for 678 Luthardt Road for the period July 2013-July 2015, dated July 19, 2013
- Cl. Ex. # 7 - Property Management Agreement between Doug and Sheryl Silvern and Felix Buchanan/Jaylix Property Management Group for 690 Luthardt Road for the period January-December 2013, dated January 8, 2013
- Cl. Ex. # 8 - Residential Lease Agreement between The Jaylix Group and Chante Drakes for 690 Luthardt Road for the period January 2013-December 2013, dated January 5, 2013
- Cl. Ex. # 9A - Letter from Claimant to Respondent, dated December 27, 2012
- Cl. Ex. # 9B - Email from Respondent to Claimant, dated January 14, 2013
- Cl. Ex. # 9C - Email thread between Respondent to Claimant, dated May 7, 2014-June 2, 2014
- Cl. Ex. # 9D - Email from Respondent to Claimant, dated June 19, 2017, with attached letter from Respondent to Claimant, dated June 14, 2017
- Cl. Ex. # 10 - Claimant's handwritten notes, dated June 22, 2017

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. # 1 - Notice of Hearing, dated April 27, 2017, with attached Order For Hearing, dated March 13, 2017
- Fund Ex. # 2 - Licensing Information for Respondent, dated January 24, 2005, for license #05-588064, printed June 21, 2017
- Fund Ex. # 3 - District Court of Maryland affidavit judgment, dated December 11, 2014

I admitted the following exhibits on behalf of the Respondent:

- Resp. Ex. # 1 - Work proposal for 678 Luthardt Road, dated August 17, 2012
- Resp. Ex. # 2 - Work proposal for 678 Luthardt Road, dated August 10, 2012
- Resp. Ex. # 3 - Business card for JAC Contracting
- Resp. Ex. # 4 - Walmart receipt for gift card, dated January 17, 2012

Resp. Ex. # 5 -Copy of check #112 from Lisa Hopkins for security deposit for 678 Luthardt Road, in the amount of \$1,800.00, dated June 14, 2011

Resp. Ex. # 6 -Jaylix Property Management list of checks received from Lisa Hopkins and Chante Drakes, for March 2013 through February 2014 (except June and December 2013)

Resp. Ex. # 7 -Email thread between Respondent and "MBQaudel," dated February 20, 2013

Resp. Ex. # 8 -TD Bank statements and notices of insufficient funds for Jaylix Property Management, LLC, for the period June 7 - July 26, 2012

Resp. Ex. # 9 -Packet of character letters concerning Respondent from:

- Mario A. Quinones, dated June 21, 2017
- Alex A. Binder, Esq., dated June 22, 2017
- Tiffany Cox, dated June 21, 2017
- Joni Holifield, dated June 21, 2017
- Alex Thomas, dated June 21, 2017
- Kendrick Tilghman, dated June 21, 2017

Testimony

The Claimant testified on her own behalf.

The Respondent testified on his own behalf.

The Fund did not present any witness testimony.

FINDINGS OF FACT

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

1. At all relevant times, the Respondent was licensed by the REC as a real estate salesperson, under License No. 05-588064.
2. The Respondent acted as a leasing agent for the firm of Keller Williams Flagship of Maryland.
3. In addition, the Respondent provided property management services through Jaylix Property Management, LLC, doing business as The Jaylix Group (Jaylix), of which the Respondent is the principal and owner.

Property 678: Management Agreement and Lease

4. At all times relevant, the Claimant owned a rental property known as 678 Luthardt Road in Middle River, Maryland 21220 (Property 678).
5. On May 23, 2011, the Claimant entered into a Property Management Agreement (678 Management Agreement) with the Respondent and Jaylix. This agreement authorized the Respondent to lease Property 678 to tenants, manage Property 678, and remit to the Claimant the rent paid by the tenant(s) net of expenses and the Respondent's 8% management fee, as provided in the agreement, for the term June 1, 2011 to June 1, 2012.
6. Under the 678 Management Agreement, the Respondent was also responsible for keeping accurate records of all money he or Jaylix received in connection with Property 678 as well as all money that he or Jaylix expended in connection with Property 678. The Respondent was also responsible for providing the Claimant with that information on a monthly basis.
7. In or about June 2011, on behalf of the Claimant, the Respondent secured a Residential Lease Agreement (Lease Agreement) pursuant to which Lisa Hopkins, as the tenant, rented Property 678 from the Claimant, as the landlord.
8. At all relevant times, the monthly rent for Property 678 pursuant to the lease between the Claimant and Lisa Hopkins was \$1,994.00. The tenant provided a security deposit of \$1,800.00.
9. The Respondent's 8% management fee pursuant to the 678 Management Agreement was \$160.00 monthly for Ms. Hopkins' lease.
10. At the end of the 678 Management Agreement's one-year term, the Claimant and the Respondent continued doing business with respect to Property 678 pursuant to the terms of the Management Agreement on a month to month basis.

11. The Lease Agreement for Property 678 was renewed for a renewal term beginning July 19, 2013 and ending on July 1, 2015.
12. The Respondent collected monthly rent from Ms. Hopkins from July 19, 2011 to June 11, 2014.
13. The Respondent failed to keep an accurate record of expenses and disbursements regarding Property 678.
14. The Respondent failed to remit to the Claimant her portion of the rent due to the Claimant for July 2012 and August 2012, and remitted only a portion of the rent that the Respondent received from the tenant during other months of Ms. Hopkins' tenancy.
15. The Claimant terminated the 678 Management Agreement on June 11, 2014 and instructed the Tenant to send all rent checks directly to her.

Property 690: Management Agreement and Lease

16. In 2013 and at all relevant times, the Claimant owned a second rental property known as 690 Luthardt Road in Middle River, Maryland 21220 (Property 690).
17. On January 8, 2013, the Claimant entered into a Property Management Agreement (690 Management Agreement) with the Respondent and Jaylix. This agreement authorized the Respondent to lease Property 690 to tenants, manage Property 690, and remit to the Claimant the rent paid by the tenant(s) net of expenses and the Respondent's 8% management fee as provided in the agreement, for the term January 1 to December 31, 2013, and included a provision for automatic annual renewal.
18. Under the 690 Management Agreement, the Respondent was responsible for keeping accurate records of all money received in connection with Property 690 as well as all money that he and Jaylix expended in connection with Property 690 and for furnishing the Claimant with that information on a monthly basis.

19. Both Management Agreements also provided that the Respondent was entitled to a fee of 50% of the first month's rent when a tenant was obtained and a lease executed.
20. On behalf of the Claimant, on January 5, 2013, the Respondent secured a Residential Lease Agreement (Rental Agreement) for Property 690 with Chante Drakes as the tenant.
21. At all relevant times, the monthly rent for Property 690 pursuant to the lease between the Claimant and Chante Drakes, the tenant, was \$1,700.00. The tenant provided a security deposit of \$1,700.00.
22. The monthly property management fee pursuant to the 690 Management Agreement was 8% of monthly rent, or \$136.00, in connection with Ms. Drakes' lease.
23. The Respondent collected monthly rent from Ms. Drakes between approximately January 5, 2013 and June 11, 2014.
24. The Respondent failed to keep an accurate record of expenses and disbursements regarding Property 690.
25. The Respondent remitted to the Claimant only a portion of the rent due to the Claimant from the lease for Property 690.
26. On June 11, 2014, the Claimant terminated the 690 Management Agreement. The Tenant moved out of the premises.
27. Metropolitan Baltimore Quadel (MBQ), now known as the Baltimore Regional Housing Partnership, provided financial assistance to both tenants for their rent. Through its Baltimore Regional Mobility Program, MBQ paid more than 90% of the rent directly to the Respondent. The tenants were each responsible for the balance of the rent.

The District Court Litigation Between the Claimant and the Respondent

28. On or about June 11, 2014, the Claimant sued the Respondent and Jaylix in the District Court of Maryland for Baltimore County (District Court). In her Complaint the Claimant alleged

that the Respondent and Jaylix failed to remit rent and deposits due and owing to the Claimant pursuant to the two Management Agreements.

29. Neither the Respondent nor Jaylix filed an answer or appeared for trial in the District Court on the Claimant's Complaint.

30. On December 11, 2014, the District Court entered an Affidavit Judgment in favor of the Claimant and against the Respondent in the principal amount of \$14,646.62, plus \$2,000.00 in attorneys' fees and court costs of \$148.00.

The Claimant's Monetary Loss as a Result of the Respondent's Conduct

31. Between January 2013 and January 2017, the Respondent paid the Claimant \$3,580.00 in rent that the Respondent owed the Claimant pursuant to the two Management Agreements.

32. The Respondent owes the Claimant an additional \$4,520.00, representing rent that the Respondent failed to remit to the Claimant as required by the two Management Agreements.

33. The Claimant sustained a monetary loss in the amount of \$4,520.00 as a result of the Respondent's conduct.

DISCUSSION

Legal Framework

A claimant may recover compensation from the Fund for an actual loss based on an act or omission by a licensed real estate broker that occurs in the provision of real estate brokerage services involving a transaction that relates to real estate that is located in this State. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (Supp. 2016). A 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 an act or omission that constitutes fraud or misrepresentation. *Id.* § 17-404(a)(2)(iii). The amount recoverable from the Fund is restricted to the actual monetary loss incurred by the claimant. Code of Maryland Regulations (COMAR) 09.11.01.14.

At a hearing on the claim, the claimant bears the burden of proving entitlement to recover from the Fund. Bus. Occ. & Prof. § 17-407(e) (Supp. 2016). For the reasons that follow, I find that the Claimant has met her burden and should be compensated by the Fund.

A “real estate broker” is an individual who provides “real estate brokerage services.” *Id.* § 17-101(n) (2010). To 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

Id. § 17-101(l).

Claims for reimbursement from the Fund are governed by section 17-404 of the Business Occupations and Professions Article, which states, in pertinent part:

- (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.

(b) *Limitation on recovery.* — The amount recovered for any claim against the Guaranty Fund may not exceed \$50,000 for each claim.

....

(d) *Limitations period.* — A claim under this subtitle shall be submitted to the Commission within 3 years after the claimant discovers or, by the exercise of ordinary diligence, should have discovered the loss or damage.

Id. § 17-404 (Supp. 2016).

With respect to the amount of funds recoverable through the Guaranty Fund, COMAR 09.11.01.14 provides as follows:

.14 Amount of Compensation Recoverable from Real Estate Guaranty Fund.

The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund, pursuant to Business Occupations and Professions Article, Title 17, Subtitle 4, Real Estate Guaranty Fund, Annotated Code of Maryland, 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 commissions owed to a licensee of this Commission acting in the licensee's capacity as either a principal or agent in a real estate transaction, or any attorney's fees the claimant may incur in pursuing or perfecting the claim against the guaranty fund.

It was undisputed that the Respondent was a licensed real estate salesperson (license #05-588064) at all relevant times. Pursuant to the Management Agreements for the two properties at issue, the Respondent was responsible for collecting rent from the tenants and making monthly disbursements to the Claimant, less any authorized deductions. The Management Agreements each provided that the Respondent was entitled to a fee equal to 50% of the first month's rent when a tenant was obtained and a lease executed, and a management fee of 8% of the monthly rent for each of the following months while the properties were rented.

The monthly rent for Property 678 was \$1,994.00 and for Property 690 was \$1,700.00. By entering into the two Management Agreements with the Claimant to manage, locate tenants, handle the leasing, and collect the rent for Property 678 and Property 690, the Respondent's activities satisfied the statutory definition of providing "real estate brokerage services." Bus. Occ. & Prof. § 17-101(n) (2010).

As both Properties are located in Middle River, Maryland, the requirement of section 17-404(a)(2)(ii), that the transactions relate to real estate located in this State, was also satisfied.

To prove entitlement to recovery from the Fund, the Claimant must prove that she incurred an actual loss based on the Respondent's acts or omissions, in which the Respondent obtained money or property by theft, embezzlement, false pretenses, or forgery, or by conduct that constituted fraud or misrepresentation. For the reasons that follow, I find that the Respondent embezzled the Claimant's funds.

Embezzlement Defined

Embezzlement occurs whenever money or other property is entrusted to one who stands in a fiduciary relationship with the owner, and the fiduciary fraudulently and willfully appropriates the property to a use and for a purpose other than that which was intended when the fiduciary relationship was created. *State v. Burroughs*, 333 Md. 614, 622 (1994).

Section 7-113(a) of the Criminal Law Article, Annotated Code of Maryland, further defines embezzlement as follows:

(a) *Prohibited.* — A fiduciary may not:

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

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

Additionally, section 17-502(b)(2) of the Business Occupations and Professions Article provides that a "real estate broker may not use trust money for any purpose other than that for which it is entrusted to the real estate broker." Bus. Occ. & Prof. § 17-502(b)(2) (2010); *see also id.* § 17-505(a). Moreover, "[i]n accepting employment as an agent, the licensee shall protect and promote the interests of the client. This 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.

Fiduciary Duty Owed by a Real Estate Broker

“A real estate broker stands in a fiduciary relationship to his client.” *Wilkins Square, LLLP v. W. C. Pinkard & Co., Inc.*, 189 Md. App. 256, 267 (2009); *see also Sellner v. Moore*, 251 Md. 391, 398 (1968) (“In common with most of the courts of this country we have held that a real estate ‘broker is a fiduciary.’ In his dealings with his employer he ‘is bound to act in good faith and to make disclosures of matters that are material and might affect the action of his employer in the premises.’” (citation omitted)).

Application of this principle to the Respondent is straightforward. When the Respondent, in exchange for monetary compensation, accepted the responsibility to lease, collect the rent, operate and manage the Claimant’s two properties pursuant to the Management Agreements, he became the Claimant’s agent and the Claimant became his principal. A fiduciary relationship was thereby created, and the Respondent undertook the duty to act in the Claimant’s interest.

For the Claimant to establish embezzlement by the Respondent, the Claimant was required to prove, and did prove, that, while serving in a fiduciary capacity, the Respondent obtained funds from the tenants, Lisa Hopkins and Chante Drakes (and from MBQ on the tenants’ behalf), and, that while serving in a fiduciary capacity, he misappropriated a portion of those funds with fraudulent intent.

Indeed, as discussed below, the Respondent admitted in his testimony that he failed to remit to the Claimant all of the funds he received as the Claimant’s agent from or on behalf of the two tenants. While he disputed the amount Claimant claimed against the Fund, the Respondent agreed that he owed her money, as a result of his collection of rent and failure to

remit to the Claimant the net amounts of rent due her in accordance with the Management Agreements.

I also conclude, based on the same facts and analysis that establish the Respondent's embezzlement of the Claimant's funds, that he obtained her funds through acts or omissions that constituted "misrepresentation" under section 17-404(a)(2)(iii) of the Business Occupations and Professions Article, in that he misrepresented that he would remit to the Claimant the funds he owed her in his capacities as property manager and fiduciary.

The Amount Compensable from the Fund

The only remaining question is the amount that the Claimant has proven that she is entitled to recover from the Fund as a result of the Respondent's misappropriation. *See* Bus. Occ. & Prof. § 17-404(a)(1) (Supp. 2016); COMAR 09.11.01.14. COMAR 09.11.01.14 limits such recovery to the Claimant's "actual monetary loss."

The computation of the Claimant's monetary loss is challenging in light of the Claimant's undisputed testimony that the Respondent never gave her IRS 1099 forms, year-end statements of account, or monthly statements containing the information necessary to reveal his receipts and disbursements. All of that information was required under the Management Agreements. The Respondent's failure in this regard understandably made it difficult for the Claimant to keep an accurate record of both the amount of rent the Respondent collected as well as the amount of the expenses he incurred for the maintenance and up-keep of the two Properties, given that the only data she had was from her own bank account statements.

The Claimant suggested that she should be awarded \$15,554.94, a number made up of the \$16,794.62 total amount of the Affidavit Judgment awarded her by the District Court, plus post-judgment interest, less \$3,580.00, the amount that the Claimant acknowledged receiving from the Respondent. (The judgment was in the principal amount of \$14,646.62, plus attorneys' fees of

\$2,000.00 and \$148.00 in court costs.) In Cl. Ex. # 10, the Claimant's own handwritten note, she stated that she received "\$3580 total of payments by Felix."

As previously noted, the Respondent and Jaylix failed to answer the District Court lawsuit and did not appear for trial. In light of the identity of the issues raised in the District Court Complaint and in this administrative proceeding, I considered recommending an award of \$11,066.62, *i.e.* the \$14,646.62 principal amount of the judgment minus the Respondent's \$3,580.00 payment to the Claimant.² For two reasons, however, I do not believe an \$11,066.62 award is supported by the evidence: First, the record does not establish that \$11,066.62 accurately reflects the amount due to Claimant by the Respondent. Second, I decline to give collateral estoppel (issue preclusion) effect to the District Court's judgment. These reasons will be discussed in turn.

First, I note that the Claimant's District Court Complaint sought damages of \$14,852.53. (Cl. Ex. # 4) While the Claimant's "Application and Affidavit in Support of Judgment" that appears at the end of her Complaint states that documents are attached to the Complaint that "contain sufficient detail as to liability and damage to apprise the Defendant clearly of the claim against the Defendant," the Complaint admitted in evidence in this case as Claimant Exhibit # 4 does *not* include those attachments. Absent the attachments, the Complaint and the Affidavit Judgment leave me in the dark both as to the Claimant's method of calculating \$14,852.53 in damages as well as to the accuracy of the calculation.

The Claimant testified that she hired Jessica Greenstein, whom the Claimant described as a forensic accountant, to help compile bank data regarding the two properties and calculate what was paid and what was still owed by the Respondent. It appears that the Claimant's damage figure of \$14,852.53 set forth in her lawsuit was based on calculations performed by Ms.

² The \$2,000.00 in attorneys' fees, the \$148.00 in court costs awarded by the District Court, and interest on the judgment are not compensable from the Fund under COMAR 09.11.01.14.

Greenstein, whose spreadsheets for Property 678 and Property 690 were introduced in evidence in this case as Cl. Exs. # 2 and 3, respectively. These spreadsheets show \$3,034.50 due on Property 690 and \$11,818.03 due on Property 678, for a total of \$14,852.53—the exact amount claimed by the Claimant in her lawsuit.

Ms. Greenstein did not testify at the hearing. Her purported forensic accounting summaries (Cl. Exs. # 2 and 3) are not certified, are not on letterhead, and they are not signed. I do not accept the accountant's calculations as reasonably accurate. The Claimant did not describe Ms. Greenstein's qualifications or her methodology. Nor did she identify with reasonable particularity the underlying documentation that the accountant used as the basis of her calculations. Absent evidence as to her qualifications, methodology, and the underlying data that Ms. Greenstein used to calculate the Claimant's loss, I find her calculations as set forth in Cl. Exs. # 2 and 3 insufficiently reliable to form the basis of an award in this case.

Second, while I do not question the validity, enforceability, or propriety of the District Court's judgment, I decline to give collateral estoppel (issue preclusion) effect to the judgment so as to establish thereby the amount of the Claimant's actual loss as \$14,646.62, *i.e.* the principal amount of the judgment. Neither the Respondent nor Jaylix filed an answer or appeared for trial. Thus, the Affidavit Judgment entered by the District Court was in substance a judgment by default and, under the circumstances, it is not entitled to collateral estoppel effect.

Maryland has adopted a four-part test to determine whether collateral estoppel should apply to a judgment:

1. Was the issue decided in the prior adjudication identical with 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?

Colandrea v. Wilde Lake Cmty. Ass'n, Inc., 361 Md. 371, 391 (2000) (citing *Wash. Suburban Sanitary Comm'n v. TKU Assocs.*, 281 Md. 1, 18-19 (1977)); see also *Garrity v. Md. State Bd. of Plumbing*, 447 Md. 359, 368 (2016).

In discussing whether a judgment by default is entitled to collateral estoppel effect, the United States Bankruptcy Court for the District of Maryland stated in *In re Beecher*, 514 B.R. 136, 153 (D. Md. 2014) (applying Maryland law):

In applying this test to default judgments, *the determination usually rests on whether the judgment was actually litigated*. This requirement is met when (as is the case here) a defendant files an answer or appears in the matter, the issues are considered by a jury or finder of fact, the defendant had notice and an opportunity to argue on its behalf, and the defendant had an incentive to litigate the matter in the prior proceeding and reasonably foresee litigation on the same issue.

(emphasis added).

Unlike the defendant in *In re Beecher*, the Respondent and Jaylix defaulted in the District Court by not answering or appearing for trial. Therefore, the issue of the amount of the Claimant's loss was not "actually litigated" in the District Court. As a result, the Affidavit Judgment is not entitled to collateral estoppel effect here.

Another method for calculating the Claimant's loss due to the Respondent's conduct that I considered would be to award the Claimant the amount the Respondent admitted owing her. As the Fund aptly noted in its closing argument, the problem with this approach is that the Respondent testified inconsistently to owing the Claimant several different amounts. Thus, in a June 15, 2017 letter to the Claimant the Respondent stated, "I really owe you \$9,100." (Cl. Ex. # 9(d), at 2). At the hearing, however, the Respondent first testified that he owed the Claimant

\$9,900.00. Then he changed his testimony and said that he owed her \$8,100.00. Finally, during his closing argument he argued that the \$8,100.00 did not take into consideration the \$3,580.00 in payments that he previously provided to Claimant which, as previously noted, the Claimant acknowledged in Cl. Ex. # 10 that Respondent had paid her.

While I acknowledge the Claimant's difficulty in proving with reasonable certainty the amount Respondent owes her, given that the Respondent is in control of many of the documents from which an accurate computation could have been made, the Claimant bears the burden of proof in this matter. The Respondent admitted owing \$8,100.00. Both parties acknowledged that he paid \$3,580.00 to the Claimant. On this record, I cannot find by a preponderance of the evidence that the Claimant has proved an entitlement to more than \$4,520.00, the amount based on the \$8,100.00 that the Respondent admitted owing, minus the \$3,580.00 that both parties agreed he previously paid.³ Accordingly, I conclude that the Claimant has established by a preponderance of the evidence that her actual loss is in the amount of \$4,520.00.⁴

CONCLUSIONS OF LAW

Based on the Findings of Facts and Discussion, I conclude as a matter of law that the Claimant sustained an actual loss, compensable by the Fund, due to an act or omission of the Respondent in which money or property was obtained from the Claimant by embezzlement and

³ The finding that the Respondent owes the Claimant \$4,520.00 (the amount based on his admission in closing argument that he owed \$8,100.00, less his undisputed \$3,580.00 payment) is supported by the evidence. The Claimant offered Respondent's June 15, 2017 letter to the Claimant and her husband, in which the Respondent stated that he "really owed" her \$9,900.00. (Cl. Ex. # 9(d)). The Respondent asserted that MBQ failed to make a \$1,800.00 rent payment for Property 678 in either January or February 2013, and argued that \$1,800.00 should therefore be subtracted from the \$9,900.00 that he had said in Cl. Ex. # 9(d) that he owed. Subtracting \$1,800.00 from \$9,900.00 leaves \$8,100.00, the amount he stated in closing argument that he owed. Further subtracting the Respondent's undisputed \$3,580.00 payment from \$8,100.00 results in a net actual loss figure of \$4,520.00. That amount (\$4,520.00) is the amount that I recommend as the amount of the Claimant's award from the Fund. I note that while the Respondent did not provide documentary evidence that MBQ actually missed this \$1,800.00 rent payment, the Claimant, who bears the burden of proof, did not establish that the rent payment was made.

⁴ The Claimant still holds the judgment against the Respondent and remains free to attempt to collect the judgment less any amount she recovers from the Fund.

misrepresentation in the provision of real estate brokerage services. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(iii) (Supp. 2016).

I further conclude as a matter of law that the amount of award that the Claimant is entitled to receive from the Fund is \$4,520.00. COMAR 09.11.01.14.

PROPOSED ORDER

I PROPOSE that the Claim filed by the Claimant against the Maryland Real Estate Guaranty Fund be GRANTED in the amount of \$4,520.00.

August 28, 2017
Date Decision Issued

RBL/emh
#168881

SIGNATURE ON FILE
Robert Levin
Administrative Law Judge

SIGNATURE ON FILE