

THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM	*	BEFORE JENNIFER M. CARTER JONES
OF KIMBERLY SUTTON,	*	ADMINISTRATIVE LAW JUDGE
CLAIMANT	*	OF THE MARYLAND OFFICE OF
AGAINST THE MARYLAND	*	ADMINISTRATIVE HEARINGS
REAL ESTATE COMMISSION	*	
GUARANTY FUND FOR THE	*	OAH NO: DLR-REC-22-14-44973
ALLEGED MISCONDUCT OF	*	
APRIL E. JOHNSON	*	MREC NO: 2013-RE-357 G.F.

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated August 6, 2015, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 16th day of September, 2015.

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

9/16/2015
Date

By: SIGNATURE ON FILE
Marla S. Johnson, Commissioner

IN THE MATTER OF THE CLAIM OF: * BEFORE JENNIFER M. CARTER JONES,
 KIMBERLY SUTTON, * AN ADMINISTRATIVE LAW JUDGE
 AGAINST THE MARYLAND REAL * OF THE MARYLAND OFFICE
 ESTATE GUARANTY FUND, * OF ADMINISTRATIVE HEARINGS
 FOR THE ALLEGED MISCONDUCT * OAH No. DLR-REC-22-14-44973
 OF APRIL E. JOHNSON * REC No. 13-RE-357

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On May 30, 2013, Kimberly Sutton (Claimant) filed a Complaint and Guaranty Fund Claim (Claim) with the Maryland Real Estate Commission (REC). The Claim alleged improper acts and omissions by April E. Johnson (the Respondent), a licensed real estate broker. The Claimant is seeking payment or reimbursement from the Commission’s Guaranty Fund (Fund).

On December 15, 2014, after an investigation, the Commission issued an Order for Hearing on the Claim. On December 23, 2014, the Commission forwarded its Order for Hearing to the Office of Administrative Hearings (OAH) with instructions to conduct a hearing and to issue a proposed decision and order in this case.

On May 8, 2015, pursuant to section 17-408 of the Business Occupations and Professions Article (Business Occupations Article) of the Annotated Code of Maryland,¹ I conducted a

¹ All citations to the Business Occupations Article are to the 2010 volume, unless otherwise indicated.

hearing at the Largo Government Center, 9201 Basil Court, Largo, Maryland, 20774. The Claimant was present at the hearing and represented herself. Assistant Attorney General Kris King represented the Fund. Neither the Respondent, nor anyone authorized to represent her, appeared at the hearing.²

The contested case provisions of the Administrative Procedure Act, the Commission's procedural regulations, and the Rules of Procedure of the OAH govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); Code of Maryland Regulations (COMAR) 09.11.03; COMAR 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss, compensable by the Fund, due to the Respondent's acts or omissions involving theft, embezzlement, false pretenses, forgery, fraud, or misrepresentation?
2. If so, what amount, if any, should be awarded to the Claimant from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Cl. Ex. 1 - Official check number 217-243623 for \$5,000.00 from the Claimant to Nu Vision Realty, dated January 30, 2010, drawn on Credit Union Family Service Centers
- Cl. Ex. 2 - Check number 8515 for \$3,000.00 from the Claimant's parents, Linda Sutton and Sidney Sutton, Jr., dated August 17, 2010, drawn on M & T Bank
- Cl. Ex. 3 - Residential Contract of Sale, Addendum of Clauses, and Disclosures
- Cl. Ex. 4 - Loan Application, dated May 30, 2013

² The Respondent died in September 2014.

I admitted the following exhibits offered for the Fund:

- Fund Ex. 1 - Certified mail copy of OAH Notice of Hearing, dated April 10, 2015
- Fund Ex. 2 - OAH Memorandum, dated May 8, 2015 with attached OAH Notice of Hearing to the Respondent, dated March 18, 2015; and Department of Labor, Licensing and Regulation (DLLR) Order For Hearing, dated December 15, 2014, returned by the United States Postal Service as undeliverable
- Fund Ex. 3 - DLLR Order for Hearing, dated March 17, 2015
- Fund Ex. 4 - Licensing information for the Respondent
- Fund Ex. 5 - Affidavit of Steven Long, Assistant Executive Director for the REC, dated May 7, 2015
- Fund Ex. 6 - Homeownership information for the Respondent from the Maryland State Department of Assessments and Taxation, printed on April 8, 2015
- Fund Ex. 7 - Letter from the REC to the Estate of April Johnson, dated January 23, 2015 with attached documents
- Fund Ex. 8 - Claimant's Complaint and Guaranty Fund Claim, dated May 30, 2013

Testimony

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

PROPOSED FINDINGS OF FACT

I propose that the Commission find the following facts by a preponderance of the evidence:

1. At all times relevant to this matter, the Respondent was a licensed real estate broker under license #4030898.
2. The Respondent's home address associated with her license is 9915 Raintree Way, Clinton, MD 20735.
3. The Respondent owned and operated Nu Vision Realty, which was located at 6200 Coventry Way, Clinton, MD 20735.

4. The Claimant and the Respondent were acquainted through the Respondent's sister, who was the Claimant's friend. In 2010, the Claimant advised the Respondent that she was interested in buying a house.

5. The Respondent required the Claimant to provide her with an earnest money deposit³ for the Respondent to use if she located a home for the Claimant to purchase. The Respondent told the Claimant that she would return the earnest money deposit.

6. In April 2010, the Claimant gave the Respondent \$5,000.00 as an earnest money deposit from her own bank account.

7. The Respondent worked with the Claimant to locate a house the Claimant was interested in purchasing. The Respondent suggested that the Claimant purchase the property at 8703 Deborah Street in Clinton, Maryland (the Deborah Street Property), which was listed for \$190,000.00.

8. On or about September 9, 2010, the Respondent submitted an offer in the amount of \$170,000.00 for the Deborah Street Property, which constituted an offer for a short sale.

9. The homeowners counteroffered the Claimant's \$170,000.00 offer with their original \$190,000.00 list amount. Sometime during September 2010, the Claimant agreed to purchase the property at the \$190,000.00 amount.

10. After the Claimant agreed to purchase the Deborah Street Property, the Respondent requested an additional \$3,000.00 as an additional earnest money deposit to support the Claimant's offer on the Deborah Street Property.

11. The Claimant's parents paid the Respondent an additional \$3,000.00 as an additional earnest money deposit on behalf of the Claimant.

³ An earnest money deposit is a form of security deposit a potential homebuyer submits to the seller of the home to demonstrate the earnestness of interest in the property at issue.

12. The Respondent advised the Claimant that the sellers of the Deborah Street Property had accepted the Claimant's offer and that the settlement would occur on October 1, 2010.

13. The settlement did not occur on October 1, 2010.

14. Shortly after October 1, 2010, the Claimant learned that the Deborah Street Property was in foreclosure and that the short sale was not accepted because a third owner/seller of the property did not accept the Claimant's offer.

15. The Claimant contacted the Respondent and told her about the information she received of the Deborah Street Property foreclosure status.

16. The Respondent eventually contacted the Claimant and confirmed that the Deborah Street property was in foreclosure.

17. The Respondent told the Claimant that she would continue to search for properties she could purchase.

18. In March 2011, the Respondent's Real Estate Broker license was revoked.

19. Between August 2011 and August 2012, the Claimant requested at least three times that the Respondent return her \$8,000.00 in earnest money deposit, but the Respondent deflected the Claimant's requests and told her to wait and see if she was able to secure another property for her to purchase.

20. The Claimant did not receive any further information from the Respondent.

21. The Respondent died in September 2014.

22. The Claimant currently resides with her parents.

DISCUSSION

I. The Statutory Notice Provisions Were Met.

Before a hearing on a claim against the Fund can proceed, the Commission must give notice to the licensee alleged to be responsible for the act or omission giving rise to the claim. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (b)(2). The Respondent died on or about September 19, 2014. On January 23, 2015, the REC sent a letter to the Respondent's estate at the Respondent's address of record, advising that the REC had received the Claimant's claim and that the REC would proceed with a hearing regarding that claim. The REC's January 23, 2015 letter further stated that by that correspondence, the REC was advising any representative of the Respondent's estate of the guaranty fund claim and potential payout from the assets of the estate. Finally, the January 23, 2015 letter provided the telephone number and the email address for the REC Complaint Administrator, John West, and advised that any questions should be directed to Mr. West. (Fund Ex. 8.)

On March 18, 2015, the OAH sent a notice of the hearing (Notice) to the Respondent's business address of record with the Commission, 6200 Coventry Way, Clinton, MD 20735 by both certified and first class mail. The United States Postal Service (USPS) returned the Notice mailed by certified mail as undeliverable as addressed. The USPS also returned the Notice sent by first class mail, stating "Attempted. Unknown." On April 9, 2015, the REC notified the OAH of an additional address it located for the Respondent, 9915 Raintree Way, Clinton, MD 20735.

On April 10, 2015, the OAH sent a copy of the Notice to the Respondent's Raintree Way address by first class and certified mail. The USPS returned the Notice sent via first class mail as "vacant." The USPS returned the Notice sent via certified mail as unclaimed.

Steven Long, Assistant Executive Director of the REC Fund, affirmed, via affidavit (Fund Ex. 5) that he accessed the Respondent's MVA records, which revealed that on or about September 19, 2014, the MVA was notified that the Respondent is deceased.

No one appeared at the hearing on behalf of the Respondent, and no one requested a postponement on her behalf.

Based on the foregoing, I find that Notice of Hearing was mailed to two of the Respondent's addresses of record; no one appeared at the hearing on behalf of the Respondent; and I held the hearing in the absence of the Respondent and/or any representative of the Respondent or her estate. COMAR 28.02.01.23A.

II. The Merits of the Claim.

Applicable Law

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

- (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^[4] by:
. . . .

⁴ To "[p]rovide 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;
- (4) engaging in a business the primary purpose of which is promoting the sale of real estate through a listing in a publication issued primarily for the promotion of real estate sales;
- (5) engaging in a business that subdivides land that is located in any state and sells the divided lots; or
- (6) for consideration, serving as a consultant regarding any activity set forth in items (1) through (5) of this subsection.

- 3. a licensed real estate salesperson;
- (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).

The governing regulations further provide, as relevant here:

- 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 real estate broker or by a duly licensed real estate broker, associate broker, or salesperson; and
 - (3) Involves conduct for which a license is required by Business Occupations and Professions Article, Title 17, Annotated Code of Maryland.

COMAR 09.11.03.04.

The Claimant bears the burden of proving entitlement to recover from the Fund.

Business Occupations Article § 17-407(e). The Claimant's burden is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217; *Schaffer v. Weast*, 546 U.S. 49, 56 (2005).

To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so[,]” when all of the evidence is considered. *Coleman v. Anne Arundel*

County Police Dep't, 369 Md. 108, 125 n.16 (2002). For the reasons explained below, I find that the Claimant has proved eligibility for compensation from the Fund.

The Claimant is Entitled to Recover from the Fund

The undisputed evidence establishes that the Respondent was a licensed real estate broker at all relevant times. (Fund Ex. 4.) The transaction plainly arises out of the Respondent's provision of real estate brokerage services and involves a transaction for real estate located in Maryland. (Test. of Claimant; Clmt. Ex. 3.) Thus, the remaining issue is whether the Claimant sustained an actual loss by virtue of the Respondent's misconduct.

As noted above, the type of "misconduct" that will support an award from the Fund includes an act or omission in which money (as is the case here) is obtained from the Claimant by theft, embezzlement, false pretenses, forgery, fraud, or misrepresentation, artifice, trickery, or deceit. Md. Code Ann., Bus. Occ. & Prof. § 17-404 (a)(2)(iii); COMAR 09.11.03.04.

"Misrepresentation" means "to represent incorrectly, improperly, or falsely."⁵ The evidence establishes that the Respondent engaged in misconduct constituting misrepresentation regarding the transaction at hand.

The Claimant testified that she had never purchased a home; she was unfamiliar with the process and trusted the Respondent, a friend's sister, to guide her through the process of purchasing her first home. The Claimant also testified that the Respondent requested that she provide \$5,000.00 as an earnest money deposit for the Respondent to use once she located a home, and assured the Claimant that she would return the earnest money deposit to her. Therefore, in April 2010, the Claimant gave the Respondent \$5,000.00 as an earnest money deposit. In summer 2010, the Respondent located the Deborah Street Property and worked with the Claimant to submit an offer on the property. After that offer was made, the Respondent

⁵ <http://dictionary.reference.com/browse/misrepresentation>

required the Claimant to give her an additional \$3,000.00 for the Respondent to use as earnest funds; the Claimant obtained that amount from her parents and submitted it to the Respondent. The Claimant presented copies of the \$8,000.00 in checks she gave to the Respondent as an earnest money deposit.

The Respondent represented to the Claimant that the Deborah Street Property sellers had accepted the Claimant's offer and that the Claimant would be proceeding to closing on October 1, 2010. When the closing did not occur on October 1, 2010, the Claimant did some research and learned that the property was in foreclosure because a third seller did not consent to her short sale offer. The Claimant contacted the Respondent, who eventually conceded that the property was in foreclosure and that she would no longer be able to purchase the property. The Respondent assured the Claimant, however, that she would continue to look for properties for her to purchase.

The Respondent never found the Claimant another property to purchase and between August 2011 and August 2012, the Claimant requested at least three times that the Respondent return the \$8,000.00 she had provided as an earnest money deposit. The Respondent deflected the Claimant's requests for the return of the money and told her that she would apply those funds to the next property the Claimant wished to purchase.

The Respondent never found the Claimant another home to purchase and she never returned the Claimant's \$8,000.00.

The Claimant's un rebutted testimony established that the Respondent obtained \$8,000.00 from the Claimant, ostensibly as an earnest money deposit. However, as of August 2011, when the Claimant began requesting the return of the deposit, the Respondent refused to return the money and represented that she would apply the money as an earnest money deposit for properties the Claimant may want to purchase in the future. The Respondent, however, never

showed the Claimant another property. In fact, as of March 2011, the Respondent's license had been revoked by the REC; accordingly, she would have been unable to represent the Claimant as her agent for the purchase of any property. The Respondent misrepresented the basis for retaining the Claimant's funds and never returned those funds to the Claimant. Accordingly, the Claimant established the requisite misconduct by the Respondent.

Finally, it is clear that the Claimant sustained an actual loss. The Claimant testified that she gave the Respondent \$8,000.00 from her personal bank account and from her parents, and she provided copies of the checks she submitted to the Respondent as earnest money deposits. The Respondent neither refunded the Claimant's deposit money nor used it to secure a property for the Claimant.

Accordingly, the Claimant established the essential elements that are required to recover from the Fund and she should receive an award from the Fund in the amount of \$8,000.00.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Claimant proved that she sustained an actual loss compensable by the Fund in the amount of \$8,000.00. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a) and 17-407(e); COMAR 09.11.03.04.

PROPOSED ORDER

I PROPOSE that the Maryland Real Estate Commission **ORDER** as follows:

1. The Maryland Real Estate Commission Guaranty Fund shall pay to the Claimant her actual monetary loss of \$8,000.00 for the Respondent's wrongful acts.
2. The Commission's records and publications shall reflect this decision.

August 6, 2015
Date Decision Issued

JCJ/emh
#157507

SIGNATURE ON FILE

Jennifer M. Carter Jones
Administrative Law Judge