

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *

v. *

CHARLENE PAULUS *
Respondent *

* CASE NO. 2007-RE-764

And *

OAH NO.DLR-REC-24-10-24984

CLAIM OF JOSEPH A. JAMES *
AGAINST THE MARYLAND *
REAL ESTATE GUARANTY FUND *

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated February 22, 2011, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 20th day of April, 2011

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, AFFIRMED;

C. That the Recommended Order be, and hereby is, AMENDED as follows:

ORDERED that the Respondent Charlene Paulus violated Md. Bus. Occ. and Prof. Art. § 17-322(b)(25), (32), and (33); and COMAR 09.11.02.01C, and 09.11.02.02A and I;

ORDERED that all real estate licenses held by the Respondent Charlene Paulus be SUSPENDED for one year;

ORDERED that the Respondent Charlene Paulus be assessed a civil penalty in the amount of \$5,000.00, which shall be paid within thirty (30) days of the date of this Proposed Order;

ORDERED that the claim of Joseph A. James against the Maryland Real Estate Guaranty Fund be DENIED;

ORDERED that all real estate licenses held by the Respondent Charlene Paulus shall be SUSPENDED if the civil penalty is not paid in full within the thirty-day time period, and that this suspension is in addition to the one year disciplinary suspension;

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

D. Pursuant to §10-220 of the State Government Article, the Commission finds that the Recommended Decision of the Administrative Law Judge had to be modified to provide a time period within which the civil penalty must be paid, and to provide that all real estate licenses held by the Respondent would remain suspended until the civil penalty is paid in full. The Judge also omitted in his recommended order the fact that the claim against the Guaranty Fund was denied. This was included in the Conclusions of Law, but also needed to be included in the order.

E. 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

MARYLAND REAL ESTATE
COMMISSION

v.

CHARLENE PAULUS,
RESPONDENT

and

CLAIM OF JOSEPH A. JAMES,
CLAIMANT

AGAINST THE MARYLAND REAL
ESTATE COMMISSION GUARANTY
FUND

* BEFORE HENRY R. ABRAMS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH CASE No.: DLR-REC-24-10-04925
* MREC FILE No: 2007-RE-764

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RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On June 21, 2007, Joseph A. James (Claimant) filed a complaint with the Maryland Real Estate Commission (REC) and a claim with the Maryland Real Estate Commission Guaranty Fund (Guaranty Fund), administrative units of the Department of Labor, Licensing and Regulation (DLLR), against Charlene Paulus (Respondent), then a licensed real estate salesperson. On January 13, 2010, the REC issued a Statement of Charges and Order for Hearing

against the Respondent, alleging that she violated the Maryland Real Estate Brokers Act (the Act), Md. Code Ann., Bus. Occ. & Prof. §§ 17-101 to 702 (2010) and the Code of¹ Ethics for individuals licensed by the REC, Code of Maryland Regulations (COMAR) 09.11.02.01 & .02.

On November 22, 2010, I conducted a hearing at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-324. The Claimant represented himself. Jessica Kaufman, Assistant Attorney General, represented the REC. Kris King, Assistant Attorney General, represented the Guaranty Fund. Neither the Respondent nor anyone acting on her behalf attended the hearing.

The Administrative Procedure Act, the procedures for Administrative Hearings of the Office of the Secretary of the DLLR, the procedures for Hearings of the Commission, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§10-201 through 10-226 (2009 & Supp. 2010); COMAR 09.01.02, 09.01.03, 09.11.03, and 28.02.01.

ISSUES

1. Did the Respondent violate the Act or the REC Code of Ethics?
2. Should the Respondent be subject to a suspension and/or a civil penalty?
3. What if any sanctions are appropriate?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the REC:

MREC Ex. #1 Notice of Hearing, dated September 9, 2010 (three duplicate copies);
Memorandum to Legal Services from Sandra Sykes, dated October 22, 2010;
Memorandum to Legal Services from Sandra Sykes, dated July 20, 2010;
Notice of Hearing, dated June 24, 2010 (two copies); DLR Statement of
Charges and Order for Hearing, dated January 13, 2010 (two copies);
Information re: hearing at OAH and request for accommodations (two copies);
Memorandum to Legal Services from Sandra Sykes, dated July 14, 2010

¹ All references to the act shall be to the 2010 replacement volume.

- MREC Ex. #1A Letter to Whom It May Concern from Spencer Stephens, Esq., dated November 9, 2010; FAX to Jessica Kaufman from Spencer Stephens; Letter to Spencer Stephens from Jessica Kaufman, dated September 20, 2010; E-mail from Mary Dattoli to Jessica Kaufman and Spencer Stephens, dated September 17, 2010; Letter to Jessica Kaufman from Spencer Stephens, dated September 17, 2010; Letter to Sandra Sykes, dated September 17, 2010; Circuit Court for Baltimore City – Notice of Motion Hearing, dated August 30, 2010
- MREC Ex. #2 Transmittal for DLR/REC case, dated January 14, 2010; with attached copy of Statement of Charges and Order for Hearing
- MREC Ex. #3 REC professional licensing information for the Complainant
- MREC Ex. #3A Address information for the Complainant, and Exhibit Register
- MREC Ex. #4 DLR Request for Investigation, dated July 14, 2008
- MREC Ex. #5 REC Report of Investigation, dated December 5, 2008, with attachments 1 through 14
- MREC Ex. #6 Addendum to the Report of Investigation
- MREC Ex. #7 Second Addendum to the Report of Investigation, dated January 23, 2009

I admitted the following exhibit into evidence on behalf of the Complainant:

- CL. Ex. 1 G & E Contractors Contract with the Claimant, dated February 8, 2007

The Respondent and Guaranty Fund did not submit any exhibits.

Testimony

The Claimant and Jennifer Grimes, REC investigator, testified on behalf of the REC. The Claimant also testified on his own behalf, as did the Claimant's wife, Melvina James, Esquire.

Neither the Guaranty Fund nor the Respondent presented any witnesses.

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 (agent) and was affiliated with Long & Foster Real Estate (Long & Foster). In 2009, the Respondent gave up her active status as an agent with the REC.

2. In or about July 2005, the Claimant contacted the Respondent to represent the Claimant in the search for and possible purchase of a home. The Respondent previously worked with the Claimant's wife, who recommended the Respondent to the Claimant.

3. The Claimant told the Respondent that the Claimant wanted to look at homes in eastern Baltimore County. The Respondent agreed to help the Claimant and represented himself as a buyer's agent.

4. At or near the outset of their relationship, the Respondent told the Claimant and his wife that the Respondent owned a home for sale on The Alameda, in Baltimore City. The Claimant said that he was not interested in a home in the City.

5. The Respondent showed the Claimant and his wife several homes in their area of interest, without success. During this process the Respondent sometimes criticized the properties being shown and repeatedly suggested to the Claimant that he consider the Respondent's home on The Alameda.

6. In or about early 2006, the Respondent stopped notifying the Claimant about potential home purchases. At that point the Claimant located through the internet several properties of interest and asked the Respondent to arrange showings. The Respondent advised the Claimant that many of these properties were already subject to contracts of sale, but he did show the Claimant others as requested. The Respondent was generally discouraging about the properties the Claimant identified, comparing them unfavorably to her home on The Alameda.

7. After several months of unsuccessful searching, the Claimant expanded his search to Baltimore City.

8. In or about the first week of April 2006, the Respondent showed her home at 5310 The Alameda, Baltimore City, Maryland (the Home) to the Claimant and his wife. The Respondent was asking approximately \$150,000.00 for the Home. The Claimant and his wife expressed interest in purchasing the Home. They asked the Respondent if they needed to get the Home inspected in connection with the possible purchase, and the Respondent told them they did not need to do so. She said that she would take care of any problems with the Home.

9. The parties negotiated a sales price of \$145,900.00. At or about the time the parties agreed on the sales price, the Respondent wrote down a number of items she was going to repair to get the Home ready for sale. The Respondent told the Claimant the items on the list were the only things that needed to be done to the Home, and she would make this list an addendum to the contract of sale.

10. The Respondent requested that the Claimant meet her at her office at Long & Foster to review the terms of a proposed contract of sale. The Respondent or someone acting on her behalf prepared the proposed contract of sale.

11. On April 9, 2006, the Claimant and Respondent met at the Respondent's office, where they each signed the proposed contract of sale (the Contract). The Contract did not bear at the top any reference to Long & Foster, nor did it list Long & Foster as the real estate broker on behalf of the buyer or seller. It instead indicated that this was a sale by owner, listing the Respondent as the sales associate. However, at least one clause, pertaining to tenant lease renewals, referred to Long and Foster Real Estate, Inc. as the listing broker of "this Lease." (MREC Ex. 5, attachment 2, at p. 11.)² The blocks in the Contract identifying the Respondent as the seller's agent, the

² The Home had been leased by the Respondent to tenants prior to the Claimant's purchase. The addendum dealing with lease renewal also contained a lead-based hazards disclosure. I assume the Respondent added this clause to the Contract for the lead-based hazard disclosure, required by law, and that the Respondent simply neglected to remove or cross out any reference to the lease.

buyer's agent or an intra-company agent with the broker as dual agent were all left unchecked. (*Id.*, at p.1.)

12. The Contract provided in paragraph 12 that the Home was sold in "as is" condition, except as otherwise specified in the Contract. The Contract contained no clause providing for a home inspection, but it did contain an Addendum listing the repairs the Respondent promised to make in connection with the sale. These repairs included: (a) sanding down all floors throughout the Home and adding carpet or polyurethane coating; (b) completing painting of the Home; (c) providing a new sump pump; (d) seeding the ground with grass; (e) providing new stone; (f) providing a new washer and dryer; (g) repairing the plumbing to the main drain; (h) repairing other plumbing problems; (i) sealing the basement walls with dry lock (to protect against water intrusion); (j) replacing basement window glass; (k) replacing living room window glass; (l) painting the basement floor; (m) painting the kitchen door; and (n) removing all trash. (*Id.*, at p. 12.³)

13. Prior to closing, the Respondent repaired items (b), (d) through (g), (i), (k), and (n) listed in the Addendum and the preceding finding of fact. It is unclear whether she repaired items (l) and (m). She failed to repair or to satisfactorily repair, items (a), (c), (h), or (j). In addition, the Respondent purchased a new furnace and water heater for the Home in 2004 and had one half of the Home's roof repaired pursuant to a contract completed on November 30, 2005.

14. The Claimant and Respondent closed on the purchase and sale of the Home on April 28, 2006. The Claimant fulfilled each of his responsibilities necessary to close on the purchase of the Home.

15. Following the closing, the Claimant discovered many problems with the Home. The gas furnace and hot water heater were not connected to a power source. Upon contact with Baltimore

³ The page number listed at the bottom of the Addendum is not clear.

Gas & Electric, the Claimant was told the furnace and hot water heater could not be connected because there was a carbon monoxide leak in one of the basement pipes. The Claimant and his wife tried on numerous occasions to telephone the Respondent about the problem. The Respondent failed to respond to the Claimant's calls for two weeks and, then, reminded the Claimant he had purchased the Home in as is condition, implying it was not the Respondent's duty to provide for the repair of the leaking pipe or the hook up of the furnace and hot water heater. However, the Respondent eventually did send someone to caulk the piping. After that, the hot water heater was connected, but the furnace was not connected during the entire time the Claimant and his wife occupied the Home.

16. Following occupancy, the Claimant and his wife also discovered that the Home was heavily infested with mice. The Respondent again resisted the Claimant's requests for assistance but, ultimately, sent an exterminator to deal with the infestation at the Respondent's expense. As learned through the exterminator sent by the Respondent, the Respondent knew prior to sale that the Home had a serious mouse infestation. The Respondent never reported this to the Claimant or his wife. Despite the treatment provided by the exterminator, the infestation continued throughout the time the Home was occupied by the Claimant and his wife,. The Claimant's wife was very frightened of mice.

17. The Claimant and his wife also encountered problems with the electrical system (which overloaded very easily) with the plumbing system, and with the roof or flashing around the roof (which leaked extensively).

18. As a result of the various problems encountered by the Claimant and his wife following occupancy, they contracted for a home inspection at their own cost. The inspection occurred on January 5, 2007, less than one year after closing. The inspection revealed a number of ongoing problems with the Home, including, among other things, unrepaired termite damage; mold and

mildew in the foundation walls; serious structural damage to the foundation walls due to water seepage; damage to floor joists due to water leakage; mouse infestation; roof flashing problems (possibly causing leakage to interior spaces); and water damage to original ceilings in the living and dining rooms, concealed behind dropped ceilings.

19. Both before and after the January 2007 inspection, the Claimant continued to complain about problems he and his wife encountered at the Home, but the Respondent failed to address many of those complaints.

20. On February 8, 2007, the Claimant obtained an estimate of \$26, 273.00 to make various repairs to the Home, all such repairs being attributable to problems that existed with the Home at the time of sale. The Claimant did not have the proposed repairs done.

21. The Respondent never provided the Claimant or his wife with a disclosure or disclaimer statement, disclosing known defects or disclaiming responsibility for defects other than known defects constituting a threat to health or safety. The Respondent never told the Claimant, orally or in writing, that she was not acting as a buyer's agent in assisting the Claimant in locating a home to purchase. The Respondent never disclosed in writing to the Claimant that she was representing the seller or both the buyer and seller in the purchase of the Home, nor did the Respondent disclose, orally or in writing, the different duties of buyers' and sellers' agents.

22. The Home was the subject of a foreclosure proceeding at the time the Claimant expressed interest in it. The Respondent never told the Claimant of the pending foreclosure action.

23. The Claimant paid approximately \$9,769.00 in mortgage payments on the Home. The Claimant stopped paying the mortgage and he and his family ultimately abandoned the Home. The Claimant's lender subsequently foreclosed on the Home.

DISCUSSION

Because the Statement of Charges (Charges) and the claim against the Guaranty Fund (Fund Claim) arose from the same facts and circumstances, I heard them in one proceeding. I considered all the evidence presented in determining the merits of both the Charges and the Fund Claim.

The REC, as the moving party on the Charges, has the burden of proving by a preponderance of the evidence that the Respondent violated the statutory and regulatory sections at issue. The Claimant, as the moving party on the Claim, has the burden of proving, by a preponderance of the evidence, that he suffered an actual loss as the result of the Respondent's misconduct. Md. Code Ann., State Gov't § 10-217 (2009); *Maryland Comm'r of Labor and Industry v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996) (quoting *Bernstein v. Real Estate Comm.*, 221 Md. 221, 231 (1959)). For the reasons set out below, I find that the REC met its burden, proving each of the Charges, but the Claimant failed to prove his Claim against the Fund.

A. The Regulatory Charges

The REC charged the Respondent with violating the following provisions of the Act and REC regulations:

§ 17-322. Denials, reprimands, suspensions, revocations and penalties – Grounds;

...

(b) *Grounds* – Subject to the hearing provisions of § 17-324 of this subtitle, the Commission may deny a license to any applicant, reprimand any licensee, or suspend or revoke a license if the applicant or licensee:

....

(25) engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings;

....

(30) fails to make the disclosure or provide the consent form

required by § 17-530 of this title;

....

(32) violates any other provision of this title; [or]

(33) violates any regulation adopted under this title or any provision of the code of ethics[.]

CODE OF MARYLAND REGULATIONS 09.11

Chapter 02 Code of Ethics

.01 Relations to the Public.

....

C. The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.

.02 Relations to the Client.

A. In 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.

....

I. Unexcused failure to ensure that a prospective purchaser has the real property disclosure statement or disclaimer statement in hand before the submission of an offer to purchase may be considered a violation of the licensee's obligation to protect and promote the interests of the licensee's client when failure could result in a contract becoming void or voidable.

1. The Respondent failed to disclose her agency relationships and otherwise engaged in incompetent, dishonest, fraudulent and improper dealings with the Claimant.

There is no doubt that the Respondent's conduct was, at the least, incompetent, in violation of section 17-322(b)(25) of the Act. First, the Respondent failed to advise the Claimant of their professional relationship, initially in assisting the Claimant in looking for a home in Baltimore County and, subsequently, in showing and proposing to sell to him the Respondent's Home.

An agent's relationship to the buyer or seller is to be disclosed to that person in writing, with the provision of a description of the different duties owed by each. Md. Bus & Occup. Code Ann. § 17-530(b)(i) through (5)(ix). A buyer's agent is a licensed real estate agent who represents a prospective buyer in the acquisition of real estate. See Md. Code Ann., Bus. Occ. & Prof. § 17-530(a)(2). A seller's agent, on the other hand, is a licensed real estate salesperson, who is affiliated with or acts as the listing (selling) broker for real estate and, in that capacity, assists a prospective purchaser in the acquisition of real estate. *Id.*, § 17-530(a)(6). Both buyers' and sellers' agents owe special duties to their clients, including the duties to maintain their clients' information in confidence and to act only in the clients' best interests. Md. Bus Occ. & Prof. Code Ann §§ 17-532(c)(i)(ii) and (2), 17-530(b)(5)(vii)(2); COMAR 09.11.02.01A.

As these statutes and regulations make clear, there is an inherent conflict between a buyer's and a seller's agent, each of whom is charged with promoting the special interests of that person's client. For example, a buyer's agent will attempt to negotiate the lowest possible price for a home while the seller's agent will try to negotiate the highest possible price. Because of the potential for conflicts, Maryland law prohibits an agent from representing both the buyer and seller in the same transaction. Md. Code Ann., Bus. Occ. & Prof. § 17-530 (c) and (d); *Proctor v. Holden*, 75 Md. App. 1, 18 (1988).

In cases where an agent or salesperson represents a buyer and the company with which the agent is affiliated is the listing agent for a seller in whose home the buyer is interested, then the company must appoint a separate agent (an intra-company agent) to represent the seller, and the two agents may not disclose their separate clients' confidential information to each other. Md. Code Ann., Bus. Occ. & Prof. § 17-530 (c) and (d). Pursuant to the Act, the agent's relationship to the client must be disclosed in writing, together with a written explanation of, among other things, the prohibition on dual representation, the role of an intra-company agent,

and the separate duties owed by each type of agent in a transaction. Md. Code Ann., Bus. Occ. & Prof. § 17-530 (b)-(e).

The Respondent failed to disclose at the outset her relationship to the Claimant in his search for a home in Baltimore County. Pursuant to the Act, an agent assisting a buyer in locating real estate for purchase and affiliated with nor acting for the listing broker (the broker contracted by the seller to sell the property), is presumed to be a buyer's agent. Md. Code Ann., Bus. Occ. & Prof § 17-530 (b)(5)(iii). This was the Respondent's role when she first worked for the Claimant, after he explained that he was not interested in the Respondent's or any other home in Baltimore City. Thereafter, when the Claimant indicated he was willing to look at the Respondent's Home, the Respondent failed to disclose the prohibition against dual representation and failed to obtain an independent person to represent the Claimant as a buyer's agent.

Second, the Respondent failed to present the Claimant with a disclosure or disclaimer statement, as required of a seller of previously owned residential real estate by section 10-702 of the Maryland Annotated Code's Real Estate Article. Pursuant to COMAR 09.11.02I, a real estate agent has a duty to ensure that a potential purchaser is given the disclosure or disclaimer statement. Pursuant to Section 10-702, the seller is required to either: (1) disclose in writing to a potential purchaser all defects of which the seller has actual knowledge regarding, among other things, the structure of the home, its heating system, and any other material defects; or (2) a written disclaimer statement, disclosing only those latent defects not reasonably expected to be discovered during a visual inspection of the home, which would pose a direct threat to the health or safety of a purchaser occupant or invitee; and a deed, except for such latent defects, the home is being sold as is. Md. . Code Ann., Real Prop § 10-702 (a), (d) and (e).

The purpose of the above requirement is to ensure that a potential purchaser is provided with information necessary to make an informed decision on whether to make an offer and what

terms would be appropriate. 79 Op. Att’y Gen. 402 (1994). Armed with a disclosure or disclaimer statement, a potential purchaser is better able, for example, to determine whether to require an independent home inspection before making an offer. Here, as an agent of both the Claimant as buyer and herself as seller, the Respondent had a clear obligation to provide the disclosure/ disclaimer statement, which she failed to do.

The above failures, without more, amount to incompetent conduct in violation of Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(25) and (30). In addition, these failures to disclose, when coupled with the Respondent’s other misconduct, demonstrate a course of conduct from which it is appropriate to infer bad faith, impropriety and fraud, also in violation of Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(25).⁴

The Respondent had been an agent since at least 1993. As such, she was very experienced in her trade. She made no claim to the REC investigator that she was unaware of her disclosure duties or her duty of absolute fidelity to her client, the Claimant. Nevertheless, in addition to failing to disclose the nature of her relationship to the Claimant and the bar against dual representation and failing to provide a disclosure/disclaimer statement, the Claimant actively concealed other material facts regarding the conditions of the Home and the existence of an ongoing foreclosure proceeding against it. As to the former, the Respondent concealed, at the least, the ongoing presence and inability to rid the property of an infestation of mice, and water stains hidden behind dropped ceilings, (indicating active water penetration or leakage). The Respondent also promised, but failed to repair, all problems the Claimant encountered with the Home. These facts, combined with the Respondent’s representation that the Claimant did not require an inspection, convincingly demonstrate that the Respondent was intent upon deceiving

⁴ Fraud requires knowing falsehood or reckless disregard for the truth. *Gourdine v. Crews*, 405 Md. 722, 758 (2008).

the Claimant. Indeed, had it been otherwise, and had the Respondent met her duty to act only in the best interest of the Claimant, she would have disclosed these matters and/or strongly advised the Claimant to obtain a home inspection.

The Respondent's failure to disclose the foreclosure proceeding is equally indicative of deceptive, self-interested conduct. It is fair to infer that the Respondent, as an experienced agent, understood that the price obtained at foreclosure is often less than that obtained via a completely arms-length sale. In light of this knowledge and coupling the failure to disclose the foreclosure with the Respondent's other omissions, fairly indicates that the Respondent actively concealed this information to obtain a higher price for the Home than the Claimant likely would have paid or would have been willing to pay had he known all the underlying facts.

2. The Respondent breached the Maryland Real Estate Code of Ethics.

The REC alleges that the Respondent's conduct breached her duty of fidelity to the Claimant and violated her duty to protect the public against fraud, misrepresentation or unethical practices in the real estate field. An agent bears each of these duties and obligations pursuant to Maryland's Real Estate Code of Ethics. COMAR 09.11.02.01C and .02A. The REC also alleges that the Respondent breached her duty to ensure that, under the circumstances of this case, the Claimant received the real estate disclosure or disclaimer statement in hand before the submission of his offer to purchase. COMAR 09.11.02.02I. For the reasons discussed above, the REC proved that the Respondent did, in fact, commit these violations.⁵

⁵ For all the foregoing reasons I find that the Respondent also violated Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b)(32) and (33). Among its other charges, the REC alleged that the Respondent misrepresented to the Claimant that the sale of the Home was being handled through Long & Foster, when in fact Long & Foster had nothing to do with the transaction. This charge is not supported by the evidence. The Claimant knew this was a sale by owner; Long & Foster was not listed in the Contract as the broker; and the only reference to Long & Foster in the Contract, in the lead hazards disclosure, was clearly inadvertent.

3. The appropriate sanction for the Respondent's misconduct.

The purpose of the Act is to protect the public in its dealings with real estate brokers and to place a duty of good faith and fair dealing on real estate brokers. *Gross v. Sussex Inc.*, 332 Md. 247, 274 (1993). To further this purpose, section 17-322(c)1) of the Act allows the REC to impose a financial penalty, not exceeding \$5,000.00 for every violation of section 17-322. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c)(1).

The REC sought a \$5,000.00 penalty against the Respondent and a one-year suspension of her real estate license. In determining the appropriate sanction, the Act directs me to consider the seriousness of the violation, the harm caused by the violation, the good faith of the licensee, and any history of previous violations in determining the appropriate penalty. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c)(2). Of those factors, the only one in the Respondent's favor is the absence of previous violations.

The violations proven were serious. The Claimants relied on the Respondent and she committed numerous violations of her statutory and regulatory duties. Had these been technical violations only-- for example, had the Respondent made full oral disclosures but not in writing, as required--a strong argument could be made for a lesser sanction than that proposed by the REC. The Respondent's lapses however were not technical. They went to the very heart of the relationship of trust and fidelity between agent and client. The purchase of a home is for most people the most significant financial transaction of their lives. It entails many technical aspects and requires a great deal of specialized knowledge, which the typical consumer relies upon the agent to provide. Fidelity and trust are essential in ensuring that the client enters into this very significant transaction with full knowledge of all potential pitfalls. Given all this, betrayal of the

agent's duty of trust and fidelity is among the most serious breaches an agent can commit.

Consequently, the REC's recommended sanction is appropriate here.⁶

B. Guaranty Fund Claim

The Claimant bears the burden of proof in support of his Claim against the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e). Claims for reimbursement from the Fund are governed by section 17-404 of the Act. COMAR 09.11.03.04 further provides guidance with respect to claims against the Fund.

Section 17-410(b)(1) of the Act provides that “[t]he Commission may order payment by the Guaranty Fund only for the actual monetary loss suffered by the claimant as a result of the claim proven by the claimant.” Md. Code Ann., Bus. Occ. & Prof. § 17-410(b)(1). *See also*, COMAR 09.11.01.18 (fund recovery limited to actual monetary loss). The term “actual loss” is not defined in the statute, regulation or any reported appellate decision. Interpreting it in the context of the statute, it means an economic loss suffered by the Claimant as a result of proven misconduct by the Respondent.

The Fund Claim is premised on the same facts that, as already discussed, proved that the Respondent violated numerous provisions of the Act and accompanying regulations. There is no doubt that the Respondent engaged in misconduct. The problem with the Fund Claim is the nature of the loss for which the Claimant seeks compensation. It does not represent an actual loss sustained as a result of the Respondent's misconduct.

The Claimant obtained a qualified estimate of \$26, 273.00 to repair the Home's defects. As previously stated, it is fair to infer that the defects pre-existed the Claimant's purchase and, thus, should have been repaired by or at the expense of the Respondent. Because the Claimant

⁶ While the Respondent's license is inactive, it has not been rescinded. Imposing a suspension will ensure that the Respondent cannot re-activate her license during the suspension period.

paid for the Home with the assumption that it was or would be made defect-free, the estimated cost of repair might represent an actual loss to the Claimant in the form of repairs he would not have made nor paid for had the Respondent abided by her promises.

Unfortunately, the Claimant did not seek the cost of repairs from the Fund. He instead only sought reimbursement for the mortgage payments he made during the time he and his wife occupied the Home. The Claimant was asked repeatedly at the hearing whether this was the sole basis of his Fund Claim and, more specifically, whether he was claiming the estimated cost of repair. The Claimant was adamant in his assertion that he only sought the return of his mortgage payments.

There are two fatal flaws with this Fund Claim. First, it amounts to a claim for rescission, in which, as a general matter, each person to a contract is returned to the person's position had there never been a contract. *See, e.g., Ryan v. Brady*, 34 Md. App. 41, 49 (1976). The parties cannot be restored to their pre-contract position in this case because the Claimant no longer possesses the Home and, thus, cannot return it to the Respondent.

Second, claims against the Fund are strictly limited to actual losses, and the Claimant did not suffer an actual loss equal to the full amount of the mortgage payments made. The Home clearly had some value, as indicated by the fact that the price paid to purchase the Home far exceeded its estimated cost of repair. Indeed, the Claimant neither claimed nor put on any evidence that the Home had no value. Thus, in living in the Home, the Claimant clearly received some value in exchange for the mortgage payments he made to live there. He received value at least equivalent to the rental value of the Home or a similar residence. Consequently, the full mortgage payments do not represent an actual loss.

The Home may have been worth less than the full mortgaged amount. To recover any mortgage overpayment, however, the Claimant needed to put on evidence of the Home's actual

value compared to the mortgage amount, allocating a portion of any excess to each mortgage payment, then multiplying the amount of excess (or loss) per payment times the number of payments made to calculate the amount of total mortgage payments made that exceeded the value of the Home on a per payment basis. The Claimant did not do this. Without this calculation, any award to the Claimant would be based on pure speculation. This would violate both the statutory limit on Fund recoveries to the actual loss sustained and would violate Maryland's common law doctrine prohibiting the recovery of speculative damages. *Stuart Kitchens, Inc. v. Stevens*, 248 Md. 71, 74-75 (1967).

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated Md. Bus Occ. & Prof. Code Ann. § 17-322(b)(25), (30), (32) and (33) and COMAR 09.11.02.01C and 09.11.02.02A and I by failing to disclose her professional relationship with the Claimant, by failing to disclose the different duties owed by sellers' and buyers' agents to their clients, by failing to disclose the prohibition against dual representation, by failing to provide a disclosure/disclaimer statement to the Claimant, by failing to disclose that the Home was the subject of a foreclosure action, and by concealing defects in the Home while simultaneously promising that all defects had been disclosed and falsely promising that all defects would be repaired.

I further conclude that the Respondent is subject to a \$5,000 penalty for violations of the Act pursuant to Md. Code Ann., Bus. Occ. & Prof. § 17-322(c).

I further conclude that the REC should suspend the Respondent's license for one year pursuant to Md. Code Ann., Bus. Occ. & Prof. § 17-322(b).

I further conclude that the Claimant failed to prove that he suffered an actual loss, entitling him to recover his mortgage payments from the Fund. Md. Code Ann., Bus. Occ. & Prof. §§ 17-410(b)(1) and COMAR 09.11.01.18.

RECOMMENDED ORDER

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

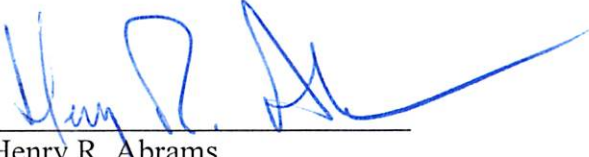
ORDER that the Respondent violated Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b) (25), (32), (33), and COMAR 09.11.02.01C and 09.11.02.02A and I;

ORDER that the Respondent be fined in the amount of \$5,000.00 pursuant to Md. Bus. & Occ. Prof. Code Ann. § 17-322(c);

ORDER that the Respondent's license be suspended for a period of one year pursuant to Md. Code Ann., Bus. & Occ. Prof. § 17-322(b); and

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

February 22, 2011
Date Decision Mailed


Henry R. Abrams
Administrative Law Judge

HRA/tc
#120145

MARYLAND REAL ESTATE

*** BEFORE HENRY R. ABRAMS,**

COMMISSION

*** AN ADMINISTRATIVE LAW JUDGE**

v.

*** OF THE MARYLAND OFFICE OF**

CHARLENE PAULUS,

*** ADMINISTRATIVE HEARINGS**

RESPONDENT

*** OAH CASE No.: DLR-REC-24-10-04925**

and

*** MREC FILE No: 2007-RE-764**

CLAIM OF JOSEPH A. JAMES,

CLAIMANT

AGAINST THE MARYLAND REAL

ESTATE COMMISSION GUARANTY

FUND

*** * * * ***

FILE EXHIBIT LIST

I admitted the following exhibits on behalf of the REC:

REC Ex. #1 Notice of Hearing, dated September 9, 2010 (three duplicate copies); Memorandum to Legal Services from Sandra Sykes, dated October 22, 2010; Memorandum to Legal Services from Sandra Sykes, dated July 20, 2010; Notice of Hearing, dated June 24, 2010 two copies); DLR Statement of Charges and Order for Hearing, dated January 13, 2010 (two copies); Information re: hearing at OAH and request for accommodations (two copies); Memorandum to Legal Services from Sandra Sykes, dated July 14, 2010

REC Ex. #1A Letter to Whom It May Concern from Spencer Stephens, Esq., dated November 9, 2010; FAX to Jessica Kaufman from Spencer Stephens; Letter to Spencer Stephens, from Jessica Kaufman, dated September 20, 2010; E-mail from Mary Dattoli to Jessica Kaufman and Spencer Stephens, dated September 17, 2010; Letter to Jessica Kaufman from Spencer Stephens, dated September 17, 2010; Letter to Sandra Sykes, dated September 17, 2010; Circuit court for Baltimore City – Notice of Motion Hearing, dated August 30, 2010

REC Ex. #2 Transmittal for DLR/REC case, dated January 14, 2010; with attached copy of Statement of Charges and Order for Hearing

REC Ex. #3 REC professional licensing information for the Complainant

REC Ex. #3A Address information for the Complainant, and Exhibit Register

REC Ex. #4 DLR Request for Investigation, dated July 14, 2008

REC Ex. #5 REC Report of Investigation, dated December 5, 2008, with attached copies of Exhibits 1-14

REC Ex. #6 Addendum to the Report of Investigation

REC Ex. #7 Second Addendum to the Report of Investigation, dated January 23, 2009

I admitted the following exhibit on behalf of the Complainant:

CL. Ex. 1 G & E Contractor's Contract with the Claimant, dated February 8, 2007

The Respondent and Guaranty Fund did not submit any exhibits.