

THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM	*	BEFORE D. HARRISON PRATT,
OF PROSPER WUSU,	*	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-22-14-18718
ALLEGED MISCONDUCT OF	*	
KENNY SMITH	*	MREC NO: 2014-RE-099 G.F.
* * * * *	*	* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated December 11, 2014, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 18th day of February, 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

SIGNATURE ON FILE

2/18/15
Date

By: _____
Marla S. Johnson, Commissioner

IN THE MATTER OF THE CLAIM OF
PROSPER WUSU,

CLAIMANT

v.

THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND,

FOR THE ALLEGED MISCONDUCT OF
KENNY SMITH,

RESPONDENT

* BEFORE D. HARRISON PRATT,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
* OAH CASE No.: DLR-REC-22-14-18718
* MREC CASE No.: 14-RE-099
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PROPOSED DECISION

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PROPOSED ORDER

STATEMENT OF THE CASE

On September 5, 2013, Prosper Wusu (the Claimant) filed a Complaint & Guaranty Fund Claim (Claim) with the Maryland Real Estate Commission (the Commission). The Claim alleged improper acts and omissions of Kenneth Smith (the Respondent), a licensed real estate broker. The Claimant is seeking payment or reimbursement from the Commission's Guaranty Fund (Fund).

On May 20, 2014, after an investigation, the Commission issued an Order for Hearing against the Respondent. On May 28, 2014, the Commission forwarded this case along with the

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 September 23, 2014, pursuant to Section 17-408 of the Business Occupations Article, I conducted a hearing at OAH's office in Kensington, Maryland. The Claimant was present at the hearing and was represented by Phillip A. Karasik, Esq. Assistant Attorney General Kris King represented the Fund. Although properly served with the Notice of Hearing from the OAH, the Respondent failed to appear, and I proceeded to hear the case in his absence.¹

The provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2009 and Supp. 2014); the Commission's procedural regulations, COMAR 09.11.03; and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

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

The Claimant submitted the following document that I admitted into evidence:

1. Packet of documents with copies of negotiated checks from the Claimant to the Respondent

¹ Section 17-324 of the Business Occupations Article provides that if the individual, after receiving proper notice of the hearing, fails or refuses to appear, the Commission may hear and determine the matter despite the individual's absence. *See also* COMAR 28.02.01.23. The Notice of Hearing from the OAH was mailed to the Respondent by first class mail and by certified mail at his address on record with the Commission. The certified mailing was returned by the post office as being unclaimed. The first class mailing was not returned, and, therefore, I find that the Respondent has been properly served with the Notice of Hearing.

The Fund submitted the following documents that I admitted into evidence:

1. Notice from the OAH of undeliverable certified mail, with the following attachments:
 - a. OAH Notice of Hearing to the Respondent
 - b. Commission's Order for Hearing
 - c. Envelope addressed to the Respondent at his address of record with certified mail receipt attached
2. Printout from the Department of Assessments and Taxation for the Respondent's address
3. Respondent's licensing history
4. Complaint filed by the Claimant

The Respondent failed to appear for the hearing and, therefore, did not submit any exhibits.

Testimony

The Claimant testified on his own behalf. No one testified on behalf of the Respondent.

The Fund did not call 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 #4223608. His license expired on January 1, 2014 and has not been renewed.
2. Between October and December 2012, the Claimant paid the Respondent a total of \$37,500.00 as earnest money deposits for the purchase of four real estate properties located in Maryland.

3. The Respondent was to obtain contracts for the purchase of the four properties on behalf of the Claimant.

4. The Respondent failed to obtain any contracts of sale on any of the properties, and he failed to return any of the money he received from Claimant.

5. The Claimant made numerous attempts to contact the Respondent in an attempt to be reimbursed the earnest money.

DISCUSSION

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

§ 17-404. Claims against the Guaranty Fund.

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

(2) A claim shall:

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

1. a licensed real estate broker;

....

(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.

With respect to claims against the Fund, COMAR 09.11.03.04 further provides as follows:

.04 Claims Against the Guaranty Fund.

- 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.**

The Claimant bears the burden of proving his entitlement to recover from the Fund. Business Occupations Article § 17-407(e). It is undisputed that, at all relevant times, the Respondent was a licensed real estate broker and that his transactions with the Claimant related to Maryland real estate, fulfilling the requirements of sections 17-404(a)(2)(i) and (ii) of the Business Occupations Article. To prove entitlement to recovery from the Fund, the Claimant must prove further that he 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, forgery, or by conduct that constituted fraud or misrepresentation.

Based on the evidence before me, I find that the Respondent obtained \$37,500.00 from the Claimant by fraud or misrepresentation.² Clearly the Respondent received the money from the Claimant as is established by the Claimant's unrefuted testimony and corroborated by the cancelled checks in evidence, checks that were negotiated by the Respondent. Furthermore, because the Respondent was entrusted with the money for the purpose of obtaining sales contracts on behalf of the Claimant, something the Respondent never did, he committed an offense considered to be embezzlement. I can only assume that the Respondent used the funds for something other than that intended by the Claimant. *State v. Burroughs*, 333 Md. 614 (1994); *see generally* 9 M.L.E. *Embezzlement* §§ 2 & 3, pp. 251-52 (2008) ("The offense of embezzlement is complete whenever a person who has been entrusted with money or property forms an intent to convert it to his or her own use, and has possession with such intent.") § 2, at 251.

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

§ 7-113. Embezzlement -- Fraudulent misappropriation by fiduciary

- (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.

² Additionally, section 17-502(b) of the Business Occupations 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." *See also* section 17-505(a)(1) of the Business Occupations Article.

The Claimant has established that the Respondent misrepresented his intentions with regard to the money he received and that, while serving in a fiduciary capacity, the Respondent misappropriated the \$37,500.00 provided to him by the Claimant.

I conclude that the Claimant has proven that he incurred an actual loss based on the Respondent's acts or omissions, in which the Respondent obtained money by misrepresentation and embezzlement of funds belonging to the Claimant. As the Claimant's agent in obtaining sales contracts for the Claimant, the Respondent owed a fiduciary obligation to the Claimant,¹ which he violated when he failed to obtain sales contracts and he failed to account for the money he was given.

The evidence is clear that the amount of money provided to the Respondent by the Claimant was \$37,500.00 as shown by the checks made out to and negotiated by the Respondent. Pursuant to COMAR 09.11.01.18, the Claimant may recover the "actual monetary loss" incurred, *i.e.* \$37,500.00. *See also* Md. Code Ann., Real Prop. § 8-303(e) (2010).

Accordingly, I agree with the Fund that the Claimant provided proof of an actual loss, of \$37,500.00, and that he should receive an award from the Fund in that amount.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that:

1. The Claimant has suffered an actual loss compensable by the Fund due to the Respondent committing acts or omissions involving misrepresentation and embezzlement; and

¹ "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." COMAR 09.11.02.02A (emphasis added).

2. The Fund should pay the Claimant his actual monetary loss, in the amount of \$37,500.00, for the Respondent's wrongful acts and omissions.

Business Occupations Article §§ 17-322(b)(22) & 404(a)(2).

PROPOSED ORDER

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

1. The Maryland Real Estate Commission Guaranty Fund shall pay to Prosper Wusu his actual monetary loss, in the amount of \$37,500.00, for the Respondent's wrongful acts and omissions.
2. The Commission's records and publications shall reflect this decision.

December 11, 2014
Date Decision Issued

SIGNATURE ON FILE

D. Harrison Pratt
Administrative Law Judge

DHP/dlm
#151841