

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**MARYLAND REAL ESTATE
COMMISSION**

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OAH CASE NO. DLR-REC-22-18-32193

v.

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**PATRICIA McINERNEY
AND
SCOTT McINERNEY,
RESPONDENTS**

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MREC CASE NO. 2017-RE-207

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OPINION AND FINAL ORDER

This matter came before a hearing panel of the Maryland Real Estate Commission ("Commission") on November 18, 2020 as a result of the written exceptions filed by Respondents, Patricia McInerney ("Respondent 1") and Scott McInerney ("Respondent 2"), to the Commission's Proposed Order of July 15, 2020. On March 3, 2020 Administrative Law Judge Syeetah Hampton-El ("ALJ") held a hearing ("ALJ Hearing") on the complaint filed against Respondents. The ALJ filed a Recommended Decision in which she recommended that Respondents be found to be in violation of certain provisions of the Maryland Real Estate Brokers Act, Title 17 of the Business and Occupations Article of the Maryland Code ("BOP") and the Code of Maryland Regulations ("COMAR") and that as a result they each be reprimanded and fined \$5,000.00. On July 15, 2020, the Commission issued the Proposed Order affirming the ALJ's Findings of Fact, approving the Conclusions of Law, and adopting the Proposed Order.

On or about August 6, 2020, Respondents filed written exceptions to the Proposed Order. A virtual hearing on the exceptions was held November 18, 2020 (the "November 18th Hearing") before a panel consisting of Commissioners Anne Cooke, Michael Lord, and Jeff

Wright (the "Panel"). Hope Sachs, Assistant Attorney General, appeared as the presenter of evidence on behalf of the Commission. Respondents were represented by counsel at the November 18th Hearing. Peggy Verbeck, Complainant, did not appear. The proceedings were electronically recorded.

SUMMARY OF THE EVIDENCE

On behalf of the Commission, three exhibits, as well as the OAH file containing the exhibits which were introduced at the ALJ Hearing, were admitted and entered into evidence:

- REC Ex. 1: Hearing notices
- REC Ex. 2: Respondents' exceptions
- REC Ex. 3: Proposed Order and Recommended Decision

No additional evidence was admitted.

FINDINGS OF FACT

The Commission adopts the Findings of Fact recommended by the ALJ.

DISCUSSION

At all times relevant to this matter, Respondent 1 was a licensed real estate associate broker, Respondent 2 was a licensed real estate salesperson. FF 1.¹ Respondent 1 had one prior Commission complaint from 2014. FF 4.

In October of 2013, Complainant contracted with Respondent 1 to list her condominium for sale. FF 7. Complainant moved out and rented the condominium. FF 8. In August of 2016 Respondent 2, serving as agent for potential buyers, submitted an all cash offer on Complainant's condominium. FF 12. Respondent 2 received a copy of a check for an earnest money deposit ("EMD") of \$2,500.00. However, the potential buyers never provided the actual check to Respondent 2 and thus he was unable to provide it to Respondent 1. FF 12. Complainant signed a dual agency agreement acknowledging that Respondent 1, representing Complainant, and

¹ FF refers to the Findings of Fact in the ALJ's Recommended Decision.

Respondent 2, representing the potential buyers, worked in the same real estate office. FF 13. From August 31, 2016 through September 26, 2016 Respondent 1 requested the EMD from Respondent 2 on multiple occasions, the potential buyers showed at a closing scheduled for September 20, 2016 but did not have the cash to purchase the condominium. FF 15, 17. Settlement was rescheduled for September 28, 2016, the potential buyers did not appear and did not wire the funds. FF 19.

Throughout October and part of November the Complainant and Respondent 2 were in touch with the potential buyers but the sale never happened. FF 23-24, 26. On October 17, 2016 Respondent 1 told Complainant she had not received the proof of funds before presenting the contract from the potential buyers. FF 21. The contract was voided because of the potential buyers' default. FF 22. Kenneth Crowley, the owner of Re/Max 100, eventually agreed to pay Complainant half the deposit, despite never having received the actual check. FF 27.

The ALJ found that the Commission met its burden to show that both Respondents violated COMAR 09.11.02.02A and BOP §§ 17-322(b)(25) and (33). The ALJ concluded that both Respondents displayed incompetence and in so doing failed to protect the interests of the parties involved and were thus subject to sanctions.

In both their written and verbal exceptions, Respondents noted that Respondent 2 repeatedly requested the funds from his clients and argued his actions sufficiently protected him from sanction. Respondent 2 argues that the ALJ created obligations in order to sanction him, for example "explaining legalities" is not a requirement under COMAR or the Brokers Act. Respondent 2 also argued the ALJ erred when accusing him of "mishandling" the EMD when he in fact never even had it. Perhaps Respondent 2 made an error in judgment, it was argued, but he

did not violate any COMAR or Brokers Act provision and thus the charges against him should have been dismissed.

Conceding that the ALJ's credibility judgment regarding Respondent 1 could not be challenged, Respondents focused on other errors regarding the sanctions issued against Respondent 1. Specifically, Respondents took issue with the ALJ's reliance on the previous charge against Respondent 1 and the conclusion that the complainant suffered "gross harm". The charge was in fact a complaint that was dismissed, no charges were ever issued against Respondent 1 in that matter.

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 agrees with the ALJ that some of the Respondents' actions rise to the level of incompetence. However, the Commission does not agree with the sanctions recommended. Regarding Respondent 2, the Commission ~~agrees with the arguments presented. The ALJ did not find that he had violated any ethical,~~ statutory, or regulatory standard regarding the failure to seek proof of funds and there was no evidence of a mishandling of an EMD. He therefore is not subject to sanction.

Regarding Respondent 1, the Commission is troubled by her actions and accepts the ALJ's conclusions regarding what she told her client and when. However, reliance on a dismissed complaint and unfounded "gross harm" was an error. Under BOP § 17-322(c)(2) "[t]o determine the amount of the penalty imposed, the Commission shall consider:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee.

