BEFORE THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM OF MATTHEW TONKIN,	*	
	*	
CLAIMANTS		
	*	**CASE NO. 2020-RE-575**
v.		
	*	**OAH NO. DOL-REC-22-22-04871**
THE MARYLAND REAL ESTATE COMMISSION GUARANTY FUND FOR THE ALLEGED MISCONDUCT OF HOLLY BUCHANAN,	*	
	*	
RESPONDENT	*	

* * * * * * * * * * * * * *

PROPOSED ORDER

The Proposed Findings of Fact, Proposed Conclusions of Law and Recommended Order of the Administrative Law Judge dated May 3, 2022, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 16 day of June, 2022, hereby **ORDERED**:

A. That the Findings of Fact in the proposed decision be, and hereby are, **AFFIRMED;**

B. That the Conclusions of Law in the proposed decision be, and hereby are, **APPROVED;**

C. That the Recommended Order in the proposed decision be, and hereby is, **ADOPTED;**

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

E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.09 those parties adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of the Order to file written exceptions to this Proposed Order. The exceptions should be sent to the

Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202. If no written exceptions are filed within the twenty (20) day period, then this Proposed Order becomes final; and

F. Once the Proposed Order becomes final, the parties have an additional thirty (30) days in which to file an appeal to the Circuit Court for the Maryland County in which the Appellant resides or has his/her principal place of business, or in the Circuit Court for Baltimore City.

MARYLAND REAL ESTATE COMMISSION

SIGNATURE ON FILE

6/16/2022
Date

By: _____

IN THE MATTER OF THE CLAIM	*	**BEFORE WILLIS GUNTHER BAKER,**
OF MATTHEW TONKIN,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND	*	**OF ADMINISTRATIVE HEARINGS**
REAL ESTATE COMMISSION	*	
GUARANTY FUND	*	**OAH No.: LABOR-REC-22-22-04871**
FOR THE ALLEGED ACTS OR	*	**REC COMPLAINT No.: 2020-RE-575**
OMISSIONS OF HOLLY BUCHANAN,	*	
RESPONDENT	*	

* * * * * * * * * * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On or about May 12, 2020, Matthew Tonkin (Claimant) filed a complaint against Holly Buchanan (Respondent) with the Maryland Real Estate Commission (REC) of the Department of Labor (Department) for alleged violations of the Maryland Real Estate Broker's Act (Act), Maryland Code Annotated, Business Occupations and Professions Article, section 17-101 *et. seq*. (2018 & Supp. 2021) and the provisions at Code of Maryland Regulations (COMAR) 09.11.01 and 09.11.02, enacted under the Act. This matter involves the Claimant's claim for reimbursement (Claim) from the REC Guaranty Fund (Fund) for losses incurred as a result of the alleged conduct of the Respondent, in her capacity as a real estate salesperson, acting as the

Claimant's property manager agent for 11002 Madison Street, Kensington, Maryland (Property). On March 1, 2022, the REC issued an Order for Hearing, determining that the Claimant was entitled to a hearing to establish his eligibility for an award from the Fund.[1] Accordingly, the REC ordered a hearing at the Office of Administrative Hearings (OAH) on the Claim against the Fund.

On April 18, 2022, I conducted a hearing remotely via the Webex videoconferencing platform from the OAH.[2] Nicholas Sokolow, Assistant Attorney General with the Department, represented the Fund. The Claimant represented himself. The Respondent failed to appear.

After waiting more than fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice.[3] On March 7, 2022, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail and certified mail delivery to the Respondent's address on record with the OAH.[4] The Notice stated that a hearing was scheduled for April 18, 2022 at 10:00 a.m. via Webex. The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."[5]

The United States Postal Service (USPS) did not return the Notice to the OAH, but the USPS did return the certified mail receipt as delivered to the Respondent. The REC provided an affidavit of Jillian Lord that she accessed the Maryland Motor Vehicle Administration (MVA) database on April 12, 2022 and confirmed that the address on record for the Respondent was the same address on file with the MVA.[6] The Respondent did not notify the OAH of any change of

---

[1] Md. Code Ann., Bus. Occ. & Profs. § 17-409(a) (2018).
[2] Md. Code Ann., Bus. Occ. & Profs. §§ 17-324(a) and 17-408(a) (2018); COMAR 28.02.21.20B.
[3] COMAR 28.02.01.23A.
[4] Md. Code Ann., Bus. Occ. & Profs. § 17-324(d)(1); COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1).
[5] Fund Exhibit 1.
[6] Fund Exhibit 5.

mailing address, email address, or phone number.[7] The Respondent made no request for postponement prior to the date of the hearing.[8] I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter.[9]

The contested case provisions of the Administrative Procedure Act, the procedures for Administrative Hearings before the Office of the Secretary of the Department of Labor, and the Rules of Procedure of the OAH govern this case.[10]

ISSUES

1. Did the Claimant sustain an actual monetary loss as a result of the Respondent's acts or omissions in her capacity as a licensed real estate salesperson; and,

2. If so, what is the appropriate award to the Claimant from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

Clmt. Ex. 1 - Letter from the REC to the Claimant, February 9, 2021

Clmt. Ex. 2 - Residential Lease of Andrew Robinson at the Property signed by the Respondent on the Claimant's behalf, December 2018

Clmt. Ex. 3 - Claimant's spreadsheet of payments made and computation of losses, undated

Clmt. Ex. 4 - Emails between the Claimant and the Respondent from August 17, 2018 to January 24, 2020[11]

---

[7] COMAR 28.02.01.03E.
[8] COMAR 28.02.01.16.
[9] COMAR 28.02.01.05A, C.
[10] Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2021); COMAR 09.01.02, 09.01.03 and 28.02.01.
[11] The Claimant's exhibits were provided by email. In addition to the emails referenced above in Exhibit 4, the Claimant also included numerous documents created in Dotloop software that I was unable to open. The Claimant withdrew the Dotloop documents in Exhibit 4 and only offered the emails.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Remote Hearing, March 7, 2022

Fund Ex. 2 - Order for Hearing, March 1, 2022

Fund Ex. 3 - Claimant's online Complaint to the REC, May 12, 2020

Fund Ex. 4 - The Respondent's Licensure record with the REC, printed April 12, 2022

Fund Ex. 5 - Affidavit of Jillian Lord, REC Assistant Executive Director, April 13, 2022

The Respondent did not offer any exhibits.

Testimony

The Claimant testified and did not present other witnesses.

The Respondent did not appear.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all relevant times, the Respondent was a real estate salesperson licensed by the REC.

2. Sometime in 2011, the Respondent and the Claimant entered into an agreement that the Respondent, in her capacity as a real estate salesperson, would act as the Claimant's agent in leasing the Property to renters, collecting rent, and maintaining the Property.

3. The Respondent was to keep the entire first month rent when there was a new tenant and collect a 6% fee from the monthly rent thereafter. She was to remit the remainder to the Claimant. The Respondent was also responsible for maintenance on the Property and was required to have the Claimant's permission for repairs and submit invoices when complete. If approved by the Claimant, the Respondent would take the expense out of the rent collection funds.

4. For the first few years, the arrangement went smoothly, and the Respondent provided the services as agreed.

5. In 2017, the Claimant moved from Maryland to Illinois. At that time, he made the Respondent both his Management Agent and his Administrative Agent for the Property.

6. In late 2017 or during 2018 the Property became vacant and the Claimant contacted the Respondent multiple times with little response. In September 2018, the Respondent told the Claimant that she had been in an accident but was recovering.[12]

7. In October 2018, the Claimant and the Respondent communicated about the Respondent's failure to file the rental license fee and about other documents required by Montgomery County to be able to lease the Property to a new tenant.[13]

8. In December 2018, the Respondent leased the Property to a new tenant (Tenant) at $2,200.00 per month, with December being pro-rated for half a month. The duration of the lease was eighteen months.[14]

9. During 2019, the Respondent remitted the following payments to the Claimant:

3/6/2019	$ 1,801.67
3/14/2019	$ 1,868.00
4/18/2019	$ 2,178.00
5/21/2019	$ 2,068.00
7/12/2019	$ 2,178.00
9/26/2019	$ 2,068.00
9/30/2019	$ 2068.00
11/18/2019	$ 2,500.00
	$16,729.67 Total[15]

10. The home was fully rented for the entire year of 2019. The Tenant paid his rent in full every month of 2019 to the Respondent.

[12] Claimant Exhibit 4.
[13] Claimant Exhibit 4.
[14] Claimant Exhibit 2.
[15] Claimant Exhibit 3. The Claimant had a misprint on the exhibit; reference to 5/21/2020 should have been to 5/21/2019.

11. The Respondent was entitled to subtract her 6% fee of $132.00 from the rent collected each month, for a total fee of $1,584.00 for 2019.

12. The Respondent did not request to perform any repairs and did not submit any receipts for any repairs or maintenance to the Claimant for the Property in 2019.

13. The Claimant should have received payment from the Respondent in the amount of $24,816.00 for the rental of the Property in 2019. The Claimant received only $16,729.67, a difference of $8,086.33.

14. The Claimant terminated his agency agreement with the Respondent in January 2020.

15. The Claimant had no familial relationship or business relationship with the Respondent other than the rental of the Property.

DISCUSSION

Legal Framework

Guarantee Fund Claim

Under the Act, a person may recover an award from the Fund for an actual loss as follows:

> (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.[16]

The activity of collecting rent for the use of real estate is considered providing brokerage services.[17] The amount of compensation recoverable by a claimant from the Fund is the actual monetary loss incurred by the claimant but may not include monetary losses other than from the originating transaction. Actual monetary losses may not include commissions owed or any attorney's fees incurred in pursuing the claim.[18] The amount recovered for a claim made against the Fund may not exceed $50,000.00.[19] There are additional limitations in the statute not relevant here.[20]

Burden of Proof

In a claim against the Fund, the Claimant bears the burden of proof, by a preponderance of the evidence, to demonstrate they suffered an actual loss because of the Respondent's acts or omissions.[21] 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.[22]

The Merits of the Case

The Claimants' Position

The Claimant contends that the Respondent withheld rental fees that should have been remitted to him. The Claimant testified that he engaged the Respondent to act as his agent in the rental of the Property and that things went well for the first few years. The Claimant moved out of State in 2017 and made the Respondent his administrative agent and management agent for the Property. In or around November 2017, the existing tenant moved out and there was little

[16] Md. Code Ann., Bus. Occ. & Profs. § 17-404(a)(2) (2018).
[17] Md. Code Ann., Bus. Occ. & Profs. § 17-101(l)(1)(ii) (2018).
[18] COMAR 09.11.01.15.
[19] Md. Code Ann., Bus. Occ. & Profs. § 17-404(b) (2018).
[20] *See* Md. Code Ann., Bus. Occ. & Profs. § 17-404(c) and (d) (2018).
[21] Md. Code Ann., Bus. Occ. & Profs. § 17-407(e) (2018); COMAR 09.01.02.16C.
[22] *Coleman v. Anne Arundel Co. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

communication from the Respondent about what she was doing to get the property leased. In September of 2018, the Respondent finally communicated with the Claimant that she had been in an accident. There were communications in October 2018 about the Respondent failing to make filings and pay fees to Montgomery County related to the rental of the Property. In December 2018 the Tenant moved in.

The Respondent would normally send the Claimant his portion of the rental income at the end of the first week of the month. Throughout 2019 the Respondent remitted sporadic payments to the Claimant of varying amounts on odd dates, which did not equal the payments he was owed. In December 2019, the Claimant traveled to Maryland and went to the Respondent's Remax Office to try to find her but was told that the Respondent had not been there for a long time. The Claimant ended his agency with the Respondent in January 2020. The Claimant communicated with the Tenant, who told him that he paid the $2,200.00 monthly rent on the first of the month to the Respondent every month of 2019. The Tenant remained in the Property under the new leasing agent and paid his rent in full during the remainder of his tenancy.

The Fund's Position

The Fund produced documentation confirming that the Respondent was a licensed real estate salesperson during the relevant period. The Fund agreed that there was no dispute of the evidence presented that the Respondent failed to remit payments to the Claimant in the amount of $8,086.33, which constitutes theft or embezzlement under the Act.

Analysis

Under the Act, a person may recover an award from the Fund for an actual loss resulting from an act or omission by a real estate salesperson in which money or property is obtained from

a person by theft, embezzlement, false pretenses, or forgery; or from an act or omission that constitutes fraud or misrepresentation.[23]

> The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund, pursuant to [the Act] 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.[24]

There is no dispute that the Property is located in the State. The Respondent's licensing status was established by the documents in evidence. The testimony and documents establish that the Respondent failed to remit rental payments to the Claimant; thus, there was an act or omission by the Respondent in the provision of real estate broker services. The Claimant has no business or familial relationship with the Respondent that would disqualify him from recovery.[25] Therefore, the Claimant has established the required conditions to pursue the Claim against the Fund.

I find the Claimant credible in his testimony of his interactions with the Respondent and in his conversation with the Tenant. The Claimant was deferential to the Respondent's claim that she had an accident in 2018 and was complimentary of the service the Respondent initially provided. Despite the Respondent failing to communicate with the Claimant and perform her duties throughout 2018, the Claimant only pursued a claim pertaining to 2019. The Respondent never communicated that the Tenant was not paying his rent in full every month or any other issue to justify the partial payments. When the Claimant engaged a new leasing agent in 2020, the Tenant had no problem paying his rent in full and on time.

---

[23] Md. Code Ann., Bus. Occ. & Profs. § 17-404(a)(2) (2018).
[24] COMAR 09.11.01.15
[25] Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(c)(2), 17-411(a)(2) (2018).

The Respondent was performing real estate brokerage services by collecting rent for the Claimant's Property.[26] The Claimant demonstrated that Property rental payments were made to the Respondent as the Claimant's agent and that she failed to fully remit the amounts owed to him under their agreement. The failure of the Respondent to remit the money she was entrusted to collect is theft and embezzlement.[27] The Claimant demonstrated that the Respondent should have remitted $24,816.00, but only sent him $16,729.67, a difference of $8,086.33. The Claimant did not include the 6% rental management fee owed to the Respondent in his loss calculations.

The Fund agreed that the Claimant suffered an actual loss because of the Respondent's acts or omissions that constituted theft and embezzlement and that the Claimant was entitled to reimbursement from the Fund in the amount of $8,086.33.

I find that the Claimant is entitled to an award from the Fund in the amount of $8,086.33, having suffered an actual loss in that amount due to the actions of the Respondent in her capacity as a real estate salesperson performing broker services.

PROPOSED CONCLUSION OF LAW

Based on the Findings of Facts and Discussion, I conclude that the Claimant has established by a preponderance of the evidence that he sustained an actual loss compensable by the Fund resulting from the Respondent's act or omission in the provision of real estate brokerage services that constitutes theft and embezzlement in the amount of $8,086.33.[28]

---

[26] Md. Code Ann., Bus. Occ. & Profs. § 17-101(l)(1)(ii) (2018).

[27] The Act does not define these terms, but I accept the definition of common understanding of theft being an unlawful taking of property and embezzlement being an appropriation of property entrusted to one's care fraudulently for one's own use. *See* https://www.merriam-webster.com, last checked April 26, 2022.

[28] Md. Code Ann., Bus. Occ. & Prof. §§ 17-404, 17-410 (2018); COMAR 09.11.01.15.

PROPOSED ORDER

I **PROPOSE** that the Claim filed by Matthew Tonkin on May 12, 2020, against the Maryland Real Estate Guaranty Fund be **GRANTED** in the amount of $ 8,086.33;

I further **PROPOSE** that the Maryland Real Estate Commission Guaranty Fund shall pay to the Claimant his actual monetary loss in the amount of $8,086.33 for the Respondent's wrongful acts and omissions;

I further **PROPOSE** that the Respondent shall be ineligible for any Maryland Real Estate Commission license until the Respondent reimburses the Fund for all monies disbursed under this Order plus annual interest of at least ten percent, as set by the Commissioner;[29] and

I further **PROPOSE** that the Commission's records and publications shall reflect this proposed decision.

SIGNATURE ON FILE

May 3, 2022
Date Decision Issued

Willis Gunther Baker
Administrative Law Judge

WGB/cj
#197793

[29] Md. Code Ann., Bus. Occ. & Profs. § 17-411(a) (2018).