

BEFORE THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM *
OF ASHWIN KUMAR, *
CLAIMANT *

CASE NO. 2018-RE-618

v. *

OAH NO. DLR-REC-22-18-36452

THE MARYLAND REAL *
ESTATE COMMISSION *
GUARANTY FUND FOR THE *
ALLEGED MISCONDUCT OF *
DUANE FARLEY, RESPONDENT *

* * * * *

PROPOSED ORDER

The Findings of Fact, Proposed Conclusions of Law and Recommended Order of the Administrative Law Judge dated May 8, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission (the "Commission"), this 19 day of June, 2019, hereby **ORDERED**:

- A. That the Findings of Fact¹ in the proposed decision be, and hereby are, **ADOPTED**.
- B. That the Proposed Conclusions of Law in the proposed decision be, and hereby are, **ADOPTED**.
- 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

¹ On page 4 of the proposed decision the Administrative Law Judge identifies the Guaranty Funds' exhibits and writes that Ex. 4 is undated. It is dated February 15, 2019 a harmless typographical error requiring correction for clarity only.

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.

F. Once this 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

6-19-2019
Date

By: SIGNATURE ON FILE

IN THE MATTER OF THE
CLAIM OF ASHWIN KUMAR,
CLAIMANT
v.
MARYLAND STATE
REAL ESTATE COMMISSION,
REAL ESTATE GUARANTY FUND,
FOR THE ALLEGED MISCONDUCT
OF DUANE FARLEY,
RESPONDENT

* BEFORE NICOLAS ORECHWA,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
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* OAH No.: DLR-REC-22-18-36452
* REC No.: 18-RE-618

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On June 18, 2018, Ashwin Kumar (Claimant)¹ filed a complaint against Duane Farley, Real Estate Broker (Respondent). The Claimant also filed a claim with the Maryland Real Estate Commission Guaranty Fund (MREC or Fund), in which he alleged he sustained monetary losses as a result of the Respondent's acts or omissions. Specifically, the Claimant alleged the Respondent, acting in her capacity as the property manager for property owned by the Claimant,

¹ The evidence indicates the Claimant and his wife Rashmi Kumar co-own the subject property. Rashmi Kumar appeared at the hearing and testified. However, the complaint and hearing order only list Ashwin Kumar as the Claimant. Accordingly, I will only refer to Ashwin Kumar when referring to the Claimant.

failed to reimburse the Claimant for various monies to which the Claimant was rightfully entitled. On November 9, 2018, the MREC ordered a hearing be set for Claimant to establish his eligibility for an award from the Fund. On November 21, 2018, the MREC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On February 19, 2019, at 10:30 a.m., I conducted a hearing at the OAH headquarters in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2018). The Claimant appeared without counsel. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation, represented the Fund. After waiting fifteen minutes, neither the Respondent nor anyone on her behalf appeared at the hearing or requested a postponement.

On January 16, 2019, the OAH mailed notice of the hearing to the Respondent by certified and regular mail to The Estate of Duane Farley,² c/o Thomas Kokolis and Jacob Deaven, Parker, Simon & Kokolis, LLC, 110 North Washington Street, Suite 500, Rockville, Maryland, 20850, the Respondent's last known address of record on file with the MREC. Md. Code Ann., Bus. Occ. & Prof. § 17-408(c) (2018).³ The notice advised the Respondent of the time, place, and date of the hearing. The United States Postal Service (USPS) did not return the notice as unclaimed or undeliverable. On January 23, 2019, the OAH received the signed return receipt for the notice. I received no forwarding order, or other correspondence from the Respondent to identify alternative addresses. Therefore, I determined that the Respondent received proper notification, but failed to appear for the hearing. As a result, I found it appropriate to proceed in the Respondent's absence. Md. Code Ann., Bus. Occ. & Prof. § 17-408(c) (2018); Code of Maryland Regulations (COMAR) 28.02.01.23A.

² As set forth in further detail below, the Respondent is deceased and all correspondence and interaction with regard to the Claim concerns the Respondent's estate. However, for the sake of simplicity, I will simply refer to the Estate as the Respondent for the balance of this decision.

³ "The Commission may not proceed with the hearing unless the records of the Commission show that all notices required under this subtitle were sent to each licensee and each unlicensed employee alleged to be responsible for the act or omission giving rise to the claim." Md. Code Ann., Bus. Occ. & Prof. § 17-408(c).

The contested case provisions of the Administrative Procedure Act, the Department's and the MREC's procedural regulations, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 09.01.03 and 09.11.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual monetary loss as a result of the Respondent's conduct which constituted theft, embezzlement, forgery, false pretenses, fraud, or misrepresentation; and, if so,
2. What is the amount of the actual loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits for the Claimant:

- CL Ex. 1: Harford County Water Bills, May 27, 2016 through May 28, 2016
- CL Ex. 2: Letter with envelope addressed to Claimant, February 10, 2017
- CL Ex. 3: Letters from Tidewater Property Management, May 2, 2016 through March 17, 2017
- CL Ex. 4: Letters from the Respondent and John Tselepis CPA, February 27, 2018 through March 12, 2018
- CL Ex. 5: Property Statements from the Respondent, January 1, 2016 through February 20, 2018
- CL Ex. 6: Lease, February 26, 2016
- CL Ex. 7: Computer Disk of sixty two pictures and two videos of damage to the Claimant's Property

CL Ex. 8: Emails between Kathleen O'Donald and Denise Diana, May 10, 2018 and transcript from One Way Solutions

CL Ex. 9: [NOT ADMITTED]⁴

I admitted the following exhibits for the Fund:

GF Ex. 1: Hearing Order, November 9, 2018

GF Ex. 2: Notice of Hearing, January 16, 2019

GF Ex. 3: Cover letter from Fund with Claimant's complaint enclosed, July 9, 2018

GF Ex. 4: Respondent's Licensing History, undated

GF Ex. 5: Affidavit of Jillian Lord, January 15, 2019

GF Ex. 6: Printout from Maryland Register of Wills, undated

The Respondent did not offer any exhibits.

Testimony

The Claimant testified and presented Rashmi Kumar as a witness. The Respondent and the Fund did not present witnesses.

FINDINGS OF FACT

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

1. At all times relevant, the Respondent was a real estate broker licensed by the MREC under License #0148951. In particular, the Respondent managed properties on behalf of owners who rented their properties to third parties.

⁴ At the hearing, I kept the record open an additional seven days to receive emails from the Claimant's former tenant and a transcript from One Way Solutions which the Claimant referenced in his testimony. The Claimant timely provided the emails and the transcript. I have marked them as CL Ex. 8 and entered them into evidence. In addition however, the Claimant provided unsolicited commentary in the email to OAH which enclosed the requested emails and transcript. He also provided a variety other documents which fall outside the scope of the requested emails and transcript. I have marked those documents, the Claimant's email commentary and the Fund's response thereto as CL Ex. 9. However, I am neither admitting that exhibit nor utilizing its contents in arriving at my recommendation to the Fund.

2. At all times relevant, the Claimant owned a residence located at 607 Hazy Dawn Drive, Aberdeen, Maryland 21001 (Hazy Dawn).

3. The Claimant and the Respondent entered into a Property Management Agreement with regard to Hazy Dawn. The Respondent managed Hazy Dawn per the terms of the Property Management Agreement, which remained in full force and effect until on or around April 1, 2018.

4. On February 26, 2016, three tenants, Ryan Jordan, Kathleen O'Donald and Raymond Jordan (tenants) signed a lease (lease) to rent Hazy Dawn. The tenants remained in Hazy Dawn under the terms of the lease through April of 2018 when they vacated the property.

5. The lease obligated the tenants to pay \$1,795.00 on the first day of each month.

6. From February 26, 2016, through December 31, 2017, the Respondent collected rent payments from the tenants. The Respondent collected no rent payments for January through April of 2018.

7. The Respondent managed Hazy Dawn from the commencement of the lease until the termination of the Property Management Agreement. Pursuant to the terms of the Property Management Agreement, the Respondent collected a fee of eight percent of the base monthly rent under the lease to manage Hazy Dawn. From February 26, 2016, through December 31, 2018, the Respondent collected those fees. The Respondent collected no management fees from January 1, 2018, through April of 2018.

8. The lease obligated the tenants to pay a penalty of five percent of any rent not paid five days or more beyond the first day of the month. Beginning on or around May 1, 2017, the tenants consistently paid their rent more than five days beyond the first of the month. The tenants paid no late fees during the time they resided in Hazy Dawn under the lease.

9. The Property Management Agreement obligated the Respondent, as part of her property management responsibilities, to enforce the provisions of the lease, and pursue eviction proceedings against tenants who consistently paid their rent late. In October of 2017, the Respondent initiated eviction proceedings against the tenants due to late rent payments.⁵

10. The lease obligated the tenants to make a security deposit of \$3,590.00. The tenants paid the Respondent \$3,590.00 as a security deposit which the Respondent deposited in her escrow account. After the tenants left Hazy Dawn, the Respondent did not return the security deposit to the tenants, or to the Claimant.

11. The tenants caused the following damages and other expenses to Hazy Dawn:

- Damaged carpet which required replacement: \$1,820.00
- Dirty carpet which required cleaning: \$250.00
- Missing garage door opener remote: \$80.00
- Damaged sink: \$428.00
- Outstanding water bill: \$160.48
- Replace smoke detectors: \$84.28
- Grass seed for bare patches in the lawn: \$20.00

12. Because the Respondent did not return the security deposit to the Claimant, the Claimant needed to pay for repairs and cleaning of Hazy Dawn himself.

13. At the time the Claimant and the Respondent entered into the Property Management Agreement, the Claimant deposited a \$200.00 repair escrow with the Respondent. The Respondent never returned nor accounted for the repair escrow.

⁵ The Respondent withdrew the eviction action in November of 2017 when the tenants paid the rent arrearage.

14. The Respondent terminated the Property Management Agreement and closed her business on April 1, 2018. The Respondent died on June 24, 2018.

DISCUSSION

The Respondent's Failure to Appear

Per the MREC's hearing order, the Respondent died on June 24, 2018. (GF Ex. 1.) The OAH scheduled the hearing in this case for Tuesday, February 19, 2019, at the OAH offices in Hunt Valley, Maryland. The OAH originally mailed a Notice of the hearing to the parties on November 29, 2018. The OAH sent the Respondent's copy of the Notice by first-class and certified mail (return receipt requested) to 327 South Union Avenue, Havre De Grace, Maryland, 21078, the Respondent's address of record with the MREC when she was alive. The OAH addressed the Notice to the attention of the Respondent's estate. The OAH sent the Notice by certified mail and the USPS returned it to the OAH as "moved left no address, unable to forward, return to sender." The USPS also returned the Notice sent by regular first class mail as "moved, unable to forward."

On or about January 15, 2019, Assistant Attorney General Andrew Brouwer searched the Maryland Register of Wills for an estate opened on behalf of the Respondent. The search yielded an estate opened on behalf of the Respondent on or about October 15, 2018. The search also revealed the estate's personal representative to be Thomas J. Kokolis, Esquire, 110 North Washington Street, Suite 500, Rockville, Maryland, 20850. Mr. Kokolis's attorney is listed as Jacob Deaven, Esquire, also located at 110 North Washington Street, Suite 500, Rockville, Maryland, 20850.⁶ On January 15, 2019, Mr. Brouwer sent a letter to the OAH notifying the clerk of the address of the Estate's personal representative, and instructing the clerk to send

⁶ All information concerning Mr. Brouwer's search of the Estate and the results of that search is contained in GF Ex. 6.

notice to that address.⁷ On January 16, 2019, the OAH sent notice by first-class and certified mail (return receipt requested) to “The Estate of Duane Farley, C/O Thomas Kokkolis (sic) and Jacob Deaven, Parker, Simon & Kokkolis (sic), LLC, 110 N. Washington Street, Suite 500, Rockville, MD 20850.” On January 25, 2019, the OAH received the green return receipt from the USPS which the recipient signed on January 22, 2019. The USPS did not return the notice the OAH sent to the Rockville address by first class mail.

Because someone signed for the notice sent by certified mail on behalf of the personal representative of the Respondent’s Estate, I find that the Respondent received proper notice of the hearing. At no time did the Respondent or anyone on the Respondent’s behalf request a postponement of the hearing.

Section 17-324 of the Business Occupations and Professions Article provides that before the Commission can take any final action against an individual, the individual must be personally served with a hearing notice, or the hearing notice must be sent by certified mail at least ten days prior to the hearing to the individual’s last known business address. Md. Code Ann., Bus. Occ. & Prof. § 17-324(d)(1) (2018). If the individual, after receiving proper notice of the hearing, fails or refuses to appear, the Commission may hear and decide the matter despite the individual’s absence. Md. Code Ann., Bus. Occ. & Prof. §§ 17-324(f), 17-408(c) (2018). The address used to notify the Respondent of the hearing is the address of the Respondent’s personal representative as determined by Mr. Brouwer on behalf of the MREC. I therefore find it is the Respondent’s address of record with the MREC. Accordingly, I conclude that the Respondent received proper notice of the hearing, but nevertheless failed to appear. As a result, I determined that it was appropriate to proceed with the hearing despite the Respondent’s failure to appear.

⁷ Mr. Brouwer provided an alternate address for the Respondent of P.O. Box 426, 42 Neptune Drive, Joppa, Maryland, 21085. The OAH sent notice to the Neptune Drive address which the USPS returned as “unclaimed, unable to forward.”

Legal Framework

Section 17-404(a) of the Business Occupations and Professions Article provides the criteria for a person to recover compensation from 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;
2. a licensed associate real estate broker;
3. a licensed real estate salesperson;
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.

The amount recovered for any claim against the Guaranty Fund “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.” COMAR 09.11.01.14. The Claimant bears the burden of proving his entitlement to recover compensation from the Guaranty Fund by a preponderance of the evidence. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2018). 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 Co. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). Under this standard, if the supporting and opposing

evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.* For the reasons articulated below, I find the Claimant has satisfied his burden as to some, but not all of his claims.

The Merits of the Case

Arguments of the Parties

Neither the Respondent nor the Fund presented any evidence to be considered. In support of his claim, the Claimant testified that he and the Respondent entered into a Property Management Agreement whereby the Respondent would manage Hazy Dawn as a rental property. The tenants signed a lease, paid a security deposit of \$3,590.00, and commenced living in Hazy Dawn in February 2016. The tenants paid rent in the amount of \$1,795.00 per month. Per the terms of the Property Management Agreement, the Respondent deducted an eight percent management fee from the monthly rent received and remitted the balance to the Claimant. Additionally, the Claimant deposited \$200.00 with the Respondent so she could address incidental repairs (\$200.00 repair escrow).

The Claimant testified that after the tenants moved into Hazy Dawn, they began to pay their rent late. When the Claimant raised this issue with the Respondent, the Respondent dismissed the Claimant's concern and told him not to "make a big deal" about the late rent payments. The Claimant also contended that the Respondent failed to change the address where Harford County sent the water bill for Hazy Dawn. The Claimant contended the Respondent should have arranged for Harford County to send the water bills directly to the tenants. Because that did not happen, Harford County threatened to turn off the water at Hazy Dawn when it did not receive payment. This all culminated in the Claimant having to pay the last water bill incurred during the time the tenants resided in Hazy Dawn.

While the tenants lived in Hazy Dawn, they allowed their dogs to relieve themselves in the house. In addition, the dogs damaged portions of the inside and outside of the house. Moreover, the tenants would park their vehicles in inappropriate places. These actions prompted the homeowners association and neighbors to write letters to the Claimant advising him of violations.

Beginning in 2018, the Claimant stopped receiving rent from the Respondent. The Respondent failed to adequately communicate with the Claimant during this time, and the Claimant had no idea if the tenants were paying rent or if they even still lived in Hazy Dawn. In February, the Respondent sent the Claimant a letter advising him that she would be closing her office effective April 1, 2018. The Claimant never received rent proceeds for January through April. In addition, the Respondent neither accounted for, nor returned to the Claimant, the security deposit and the \$200.00 repair escrow. When the Claimant gained access to Hazy Dawn, he discovered the tenants left garbage behind and their dogs damaged the interior and exterior of Hazy Dawn.

Analysis

There is no dispute the Respondent is a licensed real estate broker, Hazy Dawn is located in the State of Maryland, and the agreements into which the Claimant and the Respondent entered concern Hazy Dawn. The issues to be decided are whether the Respondent committed “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). I shall address each of the Claimant’s allegations separately below:

The \$3,590.00 Security Deposit and \$200.00 Repair Escrow

Paragraph 3 of the Lease entitled “Security Deposit: Payment and Receipt” obligates the tenants to deposit the sum of \$3,590.00 as a security deposit at the commencement of their lease.

(CL Ex. 6). The Claimant provided no concrete evidence the tenants paid the security deposit to the Respondent. However, the bottom pages of the lease indicate it is nine pages long. The Claimant provided the first eight pages of the lease as CL Ex. 6. Page eight bears the signatures of the tenants and the Respondent. The following notation is below the signatures: "NOTE: For convenience of Owner and Tenant a SECURITY DEPOSIT RECEIPT is printed on the next page." I find the fact that the security deposit receipt is part of the lease and the tenants and the Respondent signed the lease, that the tenants more likely than not paid the Respondent⁸ the security deposit at the time they signed the lease. Accordingly, I find the Respondent retained the security deposit.

The Claimant testified the Respondent never returned the security deposit to him, nor provided an accounting of its use. There is no evidence in the record the Respondent returned the security deposit to the tenants either. The Claimant provided property statements he received from the Respondent from January 2016 through February 2018. (CL Ex. 5). None of those statements reflect the security deposit being returned to either the Claimant or the tenants.

The Claimant also testified he provided the Respondent with a \$200.00 repair escrow. The Claimant did not enter a copy of the Property Management Agreement into evidence. Thus, it is unclear specifically what the Claimant's and Respondent's obligations were with regard to the \$200.00 repair escrow. Nonetheless, I find the Claimant did deposit the \$200.00 repair escrow with the Respondent. The property statement for Hazy Dawn which covers the period of January 1, 2016 to March 1, 2016, has the following line item: "02/26/2016 Repairs & Maint Retain Repair Escrow (\$200.00)." (CL Ex. 5). Accordingly, I find the Claimant provided the \$200.00 repair escrow to the Respondent. The remaining property statements show the Respondent retained a balance of \$200.00 in her account. None of the statements reflect the Respondent using

⁸ The lease defines "owner" as not just the Claimant, but the Respondent "as agent for Owner."

the \$200.00 repair escrow or returning it to the Claimant. Accordingly, I find the Respondent did not return and did not use the \$200.00 repair escrow. The Claimant testified that the tenants vacated the property at some point in April of 2018.⁹ The Respondent's letter dated February 27, 2018, advised the Claimant that she was closing her business as of April 1, 2018. Therefore, I find the Respondent should have returned the security deposit and the \$200.00 repair escrow to the Claimant in April of 2018 at the latest.

I find the Respondent committed an act or omission by failing to return the \$3,590.00 security deposit and the \$200.00 when the tenants moved out and the Property Management Agreement terminated. I further find the Respondent committed that act or omission through misrepresentation. Misrepresentation is defined as "The act or an instance of making a false or misleading assertion about something [usually] with the intent to deceive. The word denotes not just written or spoken words, but also any other conduct that amounts to a false assertion." Black's Law Dictionary (10th ed. 2014). With regard to the security deposit, as noted above, the lease receipt is missing. However, the security deposit is clearly a deposit and not a fee earned by the Respondent. Therefore, I find it returnable to tenants. I find the Respondent, acting as the Claimant's agent in executing the lease, owed a fiduciary duty to the Claimant to maintain and return the security deposit when the lease ended. I further find the Claimant had an expectation the Respondent would honor that fiduciary duty. I find the Respondent's failure to do so constitutes a misrepresentation. The Claimant, as owner of Hazy Dawn under the lease, will need to either pay the tenants the security deposit himself or, make repairs to Hazy Dawn using his own funds instead of those from the security deposit. The Claimant testified he already paid a variety of costs associated with the tenants' damage to Hazy Dawn. Accordingly, I find the Claimant suffered an actual loss with regard to the security deposit.

⁹ The Claimant's basis for this testimony shall be discussed below.

With regard to the \$200.00 repair escrow, again, the amount is clearly listed on the property statement as an amount deposited by the Claimant for the Respondent to hold in escrow – not a fee earned by the Respondent. Similar to the security deposit, the Respondent held the \$200.00 repair escrow as a fiduciary. I find the fact she neither returned it to the Claimant nor provided an accounting of its use constitutes a misrepresentation. The property statements reflect the Respondent never returned the repair escrow to the Claimant. Because the \$200.00 repair escrow remained the Claimant’s money and was not the Respondent’s to keep, I find the Claimant suffered an actual loss with regard to the \$200.00 repair escrow.

Rent payments not received from the Respondent.

Paragraph 1 of the lease obligated the tenants to pay the sum of \$1,795.00 per month in rent. The Claimant contended the Respondent did not send him rent proceeds for January, February, March and April of 2018. The Claimant testified that while he did not know for sure, he believed the tenants stopped living in Hazy Dawn in April of 2018. He based this belief on the fact the water bill for Hazy Dawn reflected use of 8,000 gallons of water between January 23, 2018 and April 20, 2018. The Claimant testified that this use was consistent with the water use which took place when he knew for certain the tenants resided in Hazy Dawn. The Claimant also stated he spoke with a neighbor who told him the tenants “took forever” to move out of Hazy Dawn during the March and April 2018 timeframe.

While the Claimant presented persuasive circumstantial evidence the tenants lived in Hazy Dawn in January, February, March and April¹⁰ of 2018, I do not find he met his burden by a preponderance of the evidence that they paid the Respondent rent during those months. First, the Claimant provided no property management statements which reflect rent payments received

¹⁰ The Claimant testified he was only seeking \$503.25 of the April 2018 rent because he did not believe the tenants lived in Hazy Dawn that entire month.

during this period. The latest rent statement the Claimant provided encompasses the period of December 22, 2017 to February 20, 2018. (CL Ex. 5). The statement contains the following line item for February 6, 2018: "Rent Rec'd from Tenant – Feb 2018 \$2,176.75." The next line item, dated February 20, 2018, reflects that the Respondent paid the Claimant \$1,859.91. The line item designates this payment as "Payment to Owner-Feb." At the hearing, the Claimant testified that the \$2,176.75 referenced in that line item most likely¹¹ concerns rent received for prior to January 2018 and was an accounting error on the Respondent's part. Thus, the statement reflects no rent collected January and February 2018.

The Claimant conceded he had no concrete proof the tenants paid rent to the Respondent for January, February, March and April of 2018. However, the Claimant contended that the tenants told Jim Henry at One Way Solutions¹² that they paid the Respondent rent for January, February, March and April of 2018. The Claimant supported this contention with emails from the tenants and a transcript from One Way Solutions. Neither the emails, nor the transcript reveal the tenants paid the Respondent rent for the months in question. The Claimant's testimony on the issue at the hearing was vague and convoluted.¹³ Accordingly, I do not find he met his burden and do not find the Respondent received rent payments from the tenants for January, February, March and April 2018. Thus, I do not find the Respondent committed any act or omission with regard to those rent payments, or that the Claimant suffered any actual loss. Accordingly, I decline to recommend the Claimant be reimbursed for the January, February, March and April 2018 rent payments.

¹¹ The Claimant was unable to definitively state a timeframe.

¹² One Way Solutions was an agency the Claimant hired to locate and recoup the missing rent and security deposit.

¹³ I find the Claimant's testimony vague and convoluted because he clearly had little knowledge as to what transpired between the tenants and Respondent during the period after December 2017. I do not find his testimony vague and convoluted as a result of him being evasive or untruthful.

The \$317.74 in Property Management Fees

The Claimant testified that the Property Management Agreement contained a provision which allowed the Respondent to retain eight percent of the base monthly rent as a property management fee. The Claimant contended he should receive reimbursement for the \$317.74 the Respondent collected in management fees per a February 1, 2018 line item on the Property Management Statement. (CL Ex. 5). However, the Claimant did not enter the Property Management Agreement into evidence. Thus, there is no evidence before me as to what obligations the Respondent had and did not have in terms of managing Hazy Dawn. I cannot determine whether the Respondent failed to perform management duties under the terms of the Property Management Agreement because I do not know the nature of those duties. Furthermore, and as noted above, the evidence is not entirely clear as to what time period the \$317.74 management fee corresponds. The Claimant testified that the amounts listed and collected on December 22, 2017 to February 20, 2018 Property Management Statement are carried over from previous months. Precisely which months those are is unclear. Thus, I cannot find the Claimant met his burden that the Respondent committed an act or omission on this issue. Therefore, I decline to recommend the Fund reimburse the Claimant the \$317.74 in property management fees.

The \$1,970.50 in Late Rent Fees

Paragraph four of the lease entitled "Payment of Rent" reads: "[Tenants agree] to pay the rent when due without any deduction or setoff. If a monthly installment of rent is paid more than five days after the date when due, [tenants] shall pay, as additional rent, a sum equal to 5% of the amount of delinquent rent due." (CL Ex. 6). The Claimant contended that the tenants routinely paid their rent late and, therefore, the Respondent should have enforced the late fee provision of

the lease. The monthly property statements reveal that the tenants did in fact pay their rent late, at least on a couple occasions. For example, in October 2017, the Respondent issued an eviction notification to the tenants. (CL Ex. 5). However, the November 2017 statement reveals the Respondent ceased any attempt to evict the tenants when they apparently became current in rent. (CL Ex. 5).

I do not find the Claimant met his burden with regard to this issue. The statements in evidence are vague as to when the tenants paid their rent. If they did pay it late, it appears from those statements the Respondent did pay attention, because she initiated an eviction action on at least one occasion. The exact nature of the Respondent's management obligations with regard to late rent payments is unclear because the Claimant did not enter the Property Management Agreement into evidence. Thus, I do not find the presence of any act or omission by the Respondent under the statute which is compensable by the Fund. Even if I did, the Claimant did not prove any actual loss. He did not provide any evidence the Respondent actually collected any late rent fees from the tenants.¹⁴ Accordingly, I decline to recommend the Fund award the Claimant \$1,970.50 or the late rent fees.

The \$2,842.76 in Repairs to Hazy Dawn

The Claimant did not include his claim for the \$2,842.76 in repairs as part of his original complaint to the Fund. Thus, I do not find this portion of the claim to be before me. Even if I did, I would decline to recommend the Fund make an award to the Claimant. I find the Claimant incurred these costs, and that the tenants did cause damage to Hazy Dawn. However, as noted above, the Claimant did not provide a copy of the Property Management Agreement. Thus, I have no knowledge as to what the parties agreed was the scope of the Respondent's property

¹⁴ At the hearing, the Claimant was not clear as to how he arrived at \$1,970.50 as the amount claimed for late rent fees.

management duties. Without that knowledge, I cannot find the Respondent committed any act or omission compensable by the Fund. Accordingly, I decline to recommend the Fund award the Claimant \$2,842.76 for the repairs to Hazy Dawn.

I therefore recommend the Fund award the Claimant \$3,790.00: \$3,590.00 for the Security Deposit and \$200.00 for the Repair Escrow.

PROPOSED CONCLUSIONS 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 Guaranty Fund resulting from the Respondent's act or omission in providing real estate brokerage services that constitutes misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2) (2018).

I further conclude as a matter of law that the amount of the award the Claimant is entitled to receive from the Fund is \$3,790.00. Md. Code Ann., Bus. Occ. § 17-404(b) (2018); COMAR 09.11.01.14.

RECOMMENDED ORDER

I **PROPOSE** that the Claim filed by the Claimant against the Maryland Real Estate Commission Guaranty Fund be **GRANTED** in the amount of \$3,790.00;

I further **PROPOSE** that the Maryland Real Estate Commission Guaranty Fund pay to the Claimant her actual monetary loss in the amount of \$3,790.00 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 Commission pursuant to Section 17-411(a) of the Business Occupations and Professions Article of the Maryland Annotated Code; and

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

May 8, 2019
Date Decision Issued

SIGNATURE ON FILE

Nicolas Orechwa
Administrative Law Judge

NO/sw
#179631