

FINAL ORDER

BEFORE THE MARYLAND REAL ESTATE COMMISSION ~~DEC 13 2011~~

MARYLAND REAL
ESTATE COMMISSION

IN THE MATTER OF THE CLAIM *
OF YONG YI CHEN AND *
EN MAI JIANG *
AGAINST THE MARYLAND REAL * CASE NO. 2011-RE-147
ESTATE GUARANTY FUND, * OAH NO. DLR-REC-22-11-08523
FOR THE ALLEGED MISCONDUCT * DLR-REC-22-11-08526
OF APRIL E. JOHNSON *
* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law, and Recommended Order of the Administrative Law Judge dated August 10, 2011, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 18th day of October, 2011

ORDERED,

A. That the Findings of Fact in the recommended decision be, and hereby are, ADOPTED;

B. That the Conclusions of Law in the recommended decision be, and hereby are, ADOPTED;

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

ORDERED that the Claim of Yong Yi Chen and En Mei Jiang against the Maryland Real Estate Guaranty Fund based on the actions of April E. Johnson is granted in the amount of \$25,000.00;

ORDERED that April E. Johnson shall be ineligible to hold a real estate license until the Fund is repaid in full together with interest as provided by law;

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 the recommended order had to be amended to include the provision that April E. Johnson shall be ineligible to hold a real estate license until the Guaranty Fund is repaid in full together with the interest prescribed by law.

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

FINAL ORDER

DEC 13 2011

MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM OF: * BEFORE SUSAN A. SINROD,
 YONG YI CHEN AND EN MEI JIANG * AN ADMINISTRATIVE LAW JUDGE
 AGAINST THE MARYLAND REAL * OF THE MARYLAND OFFICE
 ESTATE GUARANTY FUND, * OF ADMINISTRATIVE HEARINGS
 FOR THE ALLEGED MISCONDUCT * OAH No. DLR-REC-22-11-08523 and 08526
 OF APRIL E. JOHNSON * REC No. 11-RE-147GF

* * * * *

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 October 21, 2010, En Mei Jiang and Yong Yi Chen (Claimants) filed a claim with the Maryland Real Estate Guaranty Fund (Fund), established by the Maryland Real Estate Commission (REC), for reimbursement for actual losses in the amount of \$25,000.00, suffered as a result of the alleged misconduct by April E. Johnson, (Respondent), a licensed real estate broker trading as Nu Vision Realty.¹ On April 30, 2010, the REC transmitted the case to the Office of Administrative Hearings (OAH) for a contested case hearing.

On June 1, 2011, I conducted a hearing at the Largo Government Center, 9201 Basil Court, Largo, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-407(c)(2)(ii) (2010). Michael

¹ The Claimants are husband and wife and their claims are one and the same. As a result, the two cases were consolidated for the purpose of the hearing and my decision. Only one decision will be issued in this matter and will pertain to both Claimants' actions against the Fund.

P. Hsur, Esquire represented the Claimants. Kris King, Assistant Attorney General, represented the Fund. The Respondent failed to appear at the hearing.²

The contested case provisions of the Administrative Procedure Act, the procedures for Administrative Hearings of the Department of Labor, Licensing and Regulation (DLLR), and the Rules of Procedure of the OAH govern the procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); COMAR 09.01.03; 09.11.03; and 28.02.01.

ISSUES

1. Did the Claimants sustain an actual loss compensable by the Fund?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimants submitted the following exhibits, which were admitted into evidence:

- Cl. Ex. #1- Residential Contract of Sale, dated November 25, 2009
- Cl. Ex. #2- Check in the amount of \$10,000.00, dated November 25, 2009
- Cl. Ex. #3- Check in the amount of \$20,000.00, dated November 29, 2009
- Cl. Ex. #4- Unilateral Notice of Termination Under Contract of Sale, dated August 15, 2010
- Cl. Ex. #5- Check from Nu Vision Realty in the amount of \$30,000.00, dated September 10, 2010
- Cl. Ex. #6- Account Transaction Detail Report, dated October 1, 2010

The Fund submitted the following exhibits, which were admitted into evidence:

- Fund Ex. #1- Notice of Hearing dated March 16, 2011, with Order for Hearing dated February 14, 2011 and certified mailing envelope returned "unclaimed" attached

² The hearing notices were sent to the Respondent at her last known business and personal addresses of record. Both the certified mailing green card and the notice sent by regular mail were returned with the notation "unclaimed" and "unable to forward." Since the notices were mailed to the Respondent's addresses of record, I proceeded with the hearing in the Respondent's absence. State Gov't § 10-208 (2009); Md. Code Ann., Bus Occ. & Prof. § 17-408 (c) (2010).

Fund Ex. #2- Notice of Hearing dated March 16, 2011, with Order for Hearing dated February 14, 2011 and regular and certified mailing envelopes returned "unclaimed" attached

Fund Ex. #3- Order for Hearing, dated February 14, 2011

Fund Ex. #4- Licensing History of the Respondent, dated May 31, 2011

Fund Ex. #5- Affidavit of William Banks, Investigator, DLLR, dated May 31, 2011

Fund Ex. #6- Complaint and Guaranty Fund Claim of the Claimant En Mei Jiang, received October 21, 2010

Fund Ex. #7- Complaint and Guaranty Fund Claim of the Claimant Yong Yi Chen, received October 21, 2010

Testimony

The Claimants testified on their own behalf. The Fund did not present testimony.

FINDINGS OF FACT

After considering the evidence presented, I 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.

Her license was revoked on March 9, 2011.

2. In November 2009, the Claimants contacted the Respondent to assist them in initiating the purchase of a property known as 12014 Fort Washington Road, Fort Washington, Maryland (Property).

3. On November 25, 2009, with the assistance of the Respondent, the Claimants submitted a contract to the sellers of the Property. The contract offered \$300,000.00 as the purchase price for the Property, and offered an initial deposit of \$10,000.00. The sale of the Property was considered to be a short sale, as the holder of the sellers' mortgage had agreed to accept less than the amount that was owed on the mortgage as the sales price.

4. The Claimants issued a check in the amount of \$10,000.00 for the initial deposit on November 25, 2009, and gave it to the Respondent.

5. Shortly after the Claimants submitted the offer to purchase the Property, the Respondent told the Claimants that they needed to provide an additional deposit in the amount of \$20,000.00 at the request of the mortgage holder for the short sale. The Claimants did so by check dated November 29, 2009.

6. The Respondent assured the Claimants that their checks totaling \$30,000.00 were to be placed in escrow and would be applied to the purchase price of the Property.

7. The \$10,000.00 check cleared the Claimants' account on November 30, 2009, and the \$20,000.00 check cleared the Claimants' account on December 1, 2009.

8. The sellers accepted the contract on November 30, 2009.

9. After the sellers accepted the contract, the Claimants applied for a mortgage through a company that the Respondent recommended. The Claimants were approved for a loan to purchase the Property.

10. In July 2010, the Respondent informed the Claimants that the Property was under contract with another buyer. As a result, the Claimants requested the return of their \$30,000.00 deposit.

11. Subsequently, the Respondent asked the Claimants to complete a Unilateral Notice of Termination Under Contract of Sale, dated August 15, 2010, which directed the Respondent to disburse the \$30,000.00 back to the Claimants. After much procrastination, on September 10, 2010, the Respondent met the Claimants outside of her office and gave them a check for \$30,000.00

12. The Respondent's \$30,000.00 check was returned for insufficient funds.

13. The sellers of the Property were never aware of, nor did they ever request or receive the additional \$20,000.00 deposit that the Respondent received from the Claimants.

DISCUSSION

A person may recover compensation from the Fund for an actual loss based on an act or omission that occurs in the provision of real estate brokerage services by a licensed real estate broker or licensed real estate salesperson, that involves real estate located in the State. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(i), (ii) (2010). For misconduct to be compensable, the act or omission must constitute either theft, embezzlement, false pretenses, forgery, fraud or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(2)(iii) (2010); COMAR 09.11.03.04. At a hearing concerning a claim against the Fund, the burden of proof is on a claimant to establish the validity of the claim. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2010). The REC shall order payment of a claim by the Fund for the actual monetary loss, up to \$25,000, suffered by a claimant. Md. Code Ann., Bus. Occ. & Prof. § 17-410(a), (b) (2010).

Furthermore, COMAR 09.11.01.18 sets forth the parameters of an actual loss as follows:

The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund, pursuant to Business Occupations and Professions Article, Title 17, Subtitle 4, Real Estate Guaranty Fund, Annotated Code of Maryland, 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 his 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.

The statute includes the following relevant definitions at section 17-101 of the Business Occupations and Professions Article:

(a) *In general.*- In this title the following words have the meanings indicated.

...

(i) *Licensed real estate broker.*- "Licensed real estate broker" means, unless the context requires otherwise, a real estate broker who is licensed by the Commission to provide real estate brokerage services.

(j) *Licensed real estate salesperson.*- “Licensed real estate salesperson” means, unless the context requires otherwise, a real estate salesperson who is licensed by the Commission to provide real estate brokerage services on behalf of a licensed real estate broker with whom the real estate salesperson is affiliated.

...

(l) *Provide real estate brokerage services.*- “Provide real estate brokerage services” means to engage in any of the following activities:

(1) for consideration, providing any of the following services for another person:

- (i) selling, buying, exchanging, or leasing any real estate; or
- (ii) collecting rent for the use of any real estate;

(2) for consideration, assisting another person to locate or obtain for purchase or lease any residential real estate;

(3) engaging regularly in a business of dealing in real estate or leases or options on real estate;

...

(6) for consideration, serving as a consultant regarding any activity set forth in items (1) through (5) of this subsection.

(m) *Real estate.*-

(1) “Real estate” means any interest in real property that is located in this State or elsewhere.

...

Md. Code Ann., Bus. Occ. & Prof. § 17-101 (2010).

The Respondent did not appear; therefore, there was no dispute or conflict in the facts.

The Claimant En Mei Jiang testified that when the Respondent told them that someone else had contracted to buy the house, they immediately asked her for the return of their \$30,000.00. The Respondent procrastinated at first; the Claimants called her at least five or six times. According to Ms. Jiang, the Respondent had many excuses for her delay in returning the money. However, she never claimed that the Claimants were not entitled to the return of their deposit. When she finally did issue the Claimants a check, she did so outside of her office on a day that the office was closed. The check was ultimately returned for insufficient funds. After the Respondent’s check did not clear, the Claimants spoke to the listing agent, Jacqueline Barnes. Ms. Barnes told the Claimants that neither the mortgage holder nor the sellers ever received or requested the additional \$20,000.00.

The evidence established that the Respondent's acts occurred while she was providing real estate brokerage services to the Claimants. She was assisting the Claimants in the purchase of residential real estate. Md. Code Ann., Bus. Occ. & Prof. § 17-101(l) (2010). The Respondent was licensed by the REC at all times relevant to this matter. Fund Ex. #4. The Claimants' testimony was credible and established that the Respondent obtained \$30,000.00 that was designated to be placed in escrow and be applied toward the purchase price of the Property. The Respondent obtained that money by false pretenses, and by fraud and misrepresentation. The short sale lender never requested an additional \$20,000.00 as the Respondent told the Claimants, and the listing agent was never even aware of the additional payment of the \$20,000.00. Therefore, I conclude, that the Respondent misrepresented the need for the additional \$20,000.00, and instead of putting it in escrow, converted it to her own use. Additionally, when the sale of the house fell through, the entire \$30,000.00, which was to be managed in escrow by the Respondent, should have been returned to the Claimants. Thus, the Claimants have established, by a preponderance of the evidence, that they incurred an actual monetary loss in the amount of \$30,000.00 as the result of the acts of the Respondent. The statute permits a claimant to recover compensation from the Fund for an actual loss up to a maximum of \$25,000.00. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a), (b). Therefore, I must recommend that the Claimants be awarded the amount of \$25,000.00 from the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-101(l); 17-404(a)(2)(i), (ii), (iii) (2010).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Facts and Discussion, I conclude that the Claimants are entitled to reimbursement from the Real Estate Guaranty Fund in the amount of \$25,000.00 for actual losses resulting from the Respondent's theft. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(2)(iii)(1), 17-410(b)(1) (2010); COMAR 09.11.01.18; 09.11.03.04.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, I hereby
RECOMMEND that the Maryland Real Estate Commission:

ORDER that the Claimants' claim against the Maryland Real Estate Guaranty Fund be
ACCEPTED in the amount of \$25,000.00; and that it further,

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

August 10, 2011
Date Decision Mailed

SAS/rs
125185

SIGNATURE ON FILE

Susan A. Sinrod
Administrative Law Judge