

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE
COMMISSION

*

CASE NO. 2018-RE-283

v.

*

*

MARLENE PAISLEY,
Respondent

*

and

*

IN THE MATTER OF THE CLAIM
OF ARIEL HABERMAN
AGAINST THE MARYLAND REAL
ESTATE COMMISSION GUARANTY
FUND

*

OAH NO. DLR-REC-24-18-28148

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PROPOSED ORDER

The Findings of Fact, Proposed Conclusions of Law, and Recommended Order of the Administrative Law Judge dated February 12, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 26th day of March, 2019

ORDERED,

A. That the Findings of Fact in the proposed decision be, and hereby are, **ADOPTED** in part and **AMENDED** in part as follows:

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** in part and **AMENDED** in part as follows:

ORDERED that all real estate licenses held by the Respondent, Marlene Paisley, be revoked;

ORDERED that the Respondent, Marlene Paisley, pay a civil penalty in the

amount of **Four Thousand Dollars (\$4,000.00)** within thirty days;

ORDERED that the Claimant, Ariel Haberman, be reimbursed from the Maryland Real Estate Guaranty Fund in the amount of **One Thousand Dollars (\$1,000.00)**;

ORDERED that the records and publications of the Maryland Real Estate Commission reflect this decision.

E. Pursuant to Annotated Code of Maryland, State Government Article § 10-220, the Commission finds that the Proposed Decision of the Administrative Law Judge required modification because it omitted from the Recommended Order a deadline for payment of the civil penalty.¹

F. 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 exceptions and 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.

MARYLAND STATE REAL ESTATE
COMMISSION

26 March 2019
Date

By:

SIGNATURE ON FILE

Anne S. Cooke

¹ The Commission notes that on page two (2) of the Proposed Decision the Administrative Law Judge refers to the OAH Notice of Hearing and writes the Notice states the hearing would commence at 9:30 a.m. The Notice actually states the hearing will commence at 10:00 a.m. See REC Ex. 1.

MARYLAND REAL ESTATE
COMMISSION

v.

MARLENE PAISLEY,
RESPONDENT,
and

IN RE: CLAIM OF ARIEL
HABERMAN AGAINST THE
MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND

* BEFORE BRIAN PATRICK WEEKS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH No.: DLR-REC-24-18-28148
* REC CASE No.: 2018-RE-283

* * * * *

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 February 1, 2018, Ariel Haberman (Claimant) filed a complaint against licensed real estate broker Marlene Paisley (Respondent). That same day, the Claimant also filed a claim for compensation from the Real Estate Commission Guaranty Fund (Fund) for losses the Claimant allegedly sustained as a result of the Respondent's misconduct. The complaint and claim both arose out of a contract of sale entered into by the Claimant on or about August 5, 2017 for the purchase of 225 Hammershire Road in Reisterstown, Maryland (the Property).

On August 31, 2018, after an investigation, the Maryland Real Estate Commission (REC or Commission) determined that charges against the Respondent were warranted and that the Claimant was entitled to a hearing for the claim and, accordingly, the Commission issued a Statement of Charges and Order for Hearing (Statement of Charges) against the Respondent. The Statement of Charges set forth information about the Claim and further alleged that the Respondent violated Business Occupations and Professions Article Sections 17-322(b)(22), (b)(25), (b)(32), (b)(33) and 17-532(b)(1)(v) and (vi), and that she also violated Code of Maryland Regulations (COMAR) 09.11.01.07, 09.11.02.01C and 09.11.02.02A. The Statement of Charges advised the Respondent that if the charged violations were substantiated, the Commission could sanction her by, among other things, suspending or revoking her real estate license and imposing a monetary fine. On September 4, 2018, the Commission forwarded the Statement of Charges to the Office of Administrative Hearings (OAH) to conduct a hearing. On September 26, 2018, the OAH issued a Notice of Hearing, advising the parties that a hearing on the claim and on the Statement of Charges would be conducted on December 3, 2018, at the OAH in Hunt Valley, Maryland, commencing at 9:30 a.m.

On December 3, 2018, I conducted the hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. §§ 17-324(a), 17-408(a). Hope M. Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the REC on the charged violations of law. Andrew Brouwer, Assistant Attorney General, DLLR, represented the REC on the claim for compensation from the Fund. Scott Wheat, Esquire, represented the Claimant on the claim for compensation from the Fund.

After waiting more than fifteen minutes past the scheduled start time for the Respondent to appear, I proceeded in her absence as permitted by COMAR 28.02.01.23. The decision to proceed despite the Respondent's failure to appear was based on a determination that notice was

proper, since the Respondent received the September 26, 2018 Notice of Hearing, for which she signed a certified mail receipt on or about October 3, 2018.

The contested case provisions of the Administrative Procedure Act, the procedures for Administrative Hearings before the Office of the Secretary of the DLLR, and the Rules of Procedure of the OAH govern this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 and Supp. 2018); COMAR 09.01.02; COMAR 09.01.03; COMAR 28.02.01.

ISSUES

1. In connection with the sale of the Property, did the Respondent violate Business Occupations and Professions Article Sections 17-322(b)(22), (b)(25), (b)(32), or (b)(33), or 17-532(b)(1)(v) or (vi), or COMAR 09.11.01.07, 09.11.02.01C or 09.11.02.02A?
2. If the Respondent violated any of these statutory or regulatory provisions, what is the appropriate sanction?
3. Has the Claimant established a compensable claim against the Fund under Business Occupations and Professions Article Section 17-404; and, if so, what is the appropriate award?

SUMMARY OF THE EVIDENCE

Exhibits

The REC offered the following exhibits, which I admitted into evidence:

- REC Ex. 1 – Notice of Hearing, September 26, 2018
- REC Ex. 2 – Respondent's licensing history, November 30, 2018
- REC Ex. 3 – Statement of Charges and Order for Hearing, August 31, 2018
- REC Ex. 4 – Exclusive Buyer/Tenant Brokerage Agreement, August 5, 2017
- REC Ex. 5 – Residential Contract of Sale, signed August 5 and 9, 2017
- REC Ex. 6 – Copy of front of checks 102 and 103, August 5 and 21, 2017
- REC Ex. 7 – Emails between Claimant and Respondent, November 7 through 9, 2017

REC Ex. 8 – Letter from Respondent to Claimant, November 11, 2017

REC Ex. 9 – Emails from Claimant to Respondent, November 21 and December 18, 2017
Mutual Release of Obligation Under Contract of Sale, November 20, 2017

REC Ex. 10 – Emails between Claimant and Respondent, various dates between December 1 and 18, 2017

REC Ex. 11 – REC Complaint & Guaranty Fund Claim, February 1, 2018

REC Ex. 12 – Email from Respondent to REC, February 16, 2018

REC Ex. 13 – Letter from REC to Respondent, July 2, 2018

REC Ex. 14 – Letter from REC to Respondent, July 3, 2018

REC Ex. 15 – Email from REC Fiscal Auditor, August 12, 2018

The Claimant offered the following exhibit, which I admitted into evidence:

Clmt. Ex. 1 – Posting information for Check 103, undated

The Fund did not offer any exhibits for inclusion in the record.

The Respondent failed to appear and therefore did not offer any exhibits.

Testimony

The REC presented testimony from the Claimant and Patrick Richardson, Fiscal Auditor from the REC. Both witnesses were treated as witnesses for the REC in the regulatory matter and for the Claimant in the Fund matter.

The Claimant did not present any witnesses other than the REC's witnesses.

The Fund did not present any witnesses.

The Respondent failed to appear and therefore did not present any witnesses.

FINDINGS OF FACT

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

1. The Respondent has been a licensed real estate agent in Maryland since 2009 and has had no prior complaints filed against her with the REC.

2. At all times relevant to this matter, the Respondent was a real estate broker affiliated with Jems Realty, LLC.

3. On August 5, 2017, the Claimant entered into an Exclusive Buyer/Tenant Brokerage Agreement (Brokerage Agreement) with the Respondent. The Brokerage Agreement specifies that the Claimant agrees to pay the Respondent a fee in the amount of 3% of the purchase price for any property purchased by the Claimant within two months after the expiration or termination of the Brokerage Agreement. The Brokerage Agreement further defines purchase to include a written offer made by the Claimant that has been accepted by the seller.

4. On or about August 5, 2017, the Claimant signed a contract (Contract) for the purchase of the Property. The Contract required an initial deposit (Deposit) of \$1,000.00 due at the time of the offer, which was to be held in a non-interest bearing escrow account by Jems Realty, LLC. The seller accepted the Contract on August 9, 2017. The Contract required third-party approval by Wells Fargo Bank (Wells Fargo), since it involved a short sale.

5. On August 5, 2017, the Claimant signed a check for \$1,000.00 made payable to "James Realty LLC." This check was never deposited or presented for payment by the Respondent.

6. On August 21, 2017, the Claimant signed a check for \$1,000.00 made payable to "Jems Realty." That same day, the Respondent deposited the check in an escrow account and then withdrew \$500.00 of the Deposit funds from the escrow account.

7. On August 23, 2017, the Respondent withdrew the remaining \$500.00 of the Deposit funds from the escrow account.

8. On or about November 1, 2017, the Respondent informed the Claimant by email that Wells Fargo had declined to approve the short sale of the Property. The Respondent stated

that she had included a mutual release form for the Deposit and that she expected the Claimant to release the deposit funds to her so that she could keep the Deposit funds as payment of her commission under the Brokerage Agreement.

9. On November 7, 2017, the Claimant terminated the Brokerage Agreement and requested the immediate release of the Deposit funds by the Respondent. In response, the Respondent offered to return \$500.00 to the Claimant.

10. On November 11, 2017, the Respondent sent a letter to the Claimant in which she informed him that she would send the Deposit funds to him if he signed a release and sent it to her within thirty days of mailing the notice. She also informed him that if she did not receive the signed release then she would keep the Deposit funds as payment for commission earned under the Brokerage Agreement.

11. On November 21, 2017, the Claimant sent a Mutual Release of Obligation under Contract of Sale and Mutual Release of Deposit Agreement (Release) regarding the Property to the Respondent by email and certified mail.

12. On December 17, 2017, the Respondent informed the Claimant that she had not received the Release from the Claimant, and therefore would be retaining the deposit as compensation for commission earned under the Brokerage Agreement.

13. On February 1, 2018, the Claimant filed a complaint and Guaranty Fund claim with the REC.

14. On February 16, 2018, the Respondent responded to the REC regarding the complaint and provided the REC with her file for the Property.

15. The Respondent's file for the Property was not complete; it did not contain a copy of the Contract or escrow account statements.

16. On July 2 and 3, 2018, the REC informed the Respondent by letter that its fiscal auditor, Patrick Richardson, had been trying to audit her escrow account pertaining to the Property without success.

17. On July 6, 2018, the Respondent provided a copy of the Contract and escrow bank statements to the REC.

DISCUSSION

The Regulatory Charges

Section 17-322 of the Business Occupations Article provides, as relevant here:

(b) Subject to the hearing provisions of § 17-324 of this subtitle, the Commission may deny a license to any applicant, reprimand any licensee, or suspend or revoke a license if the applicant or licensee:

...

(22) fails to account for or to remit promptly any money that comes into the possession of the licensee but belongs to another person;

...

(25) engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings;

...

(32) violates any other provision of this title; [or]

(33) violates any regulation adopted under this title or any provision of the code of ethics[.]

...

(c) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding \$5,000 for each violation.

Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(22), (25), (32)-(33) and (c).

Section 17-532 of the Business Occupations Article provides, as relevant here:

(b)(1) A licensee shall:

...

(v) in a timely manner account for all trust money received; [and]

(vi) exercise reasonable care and diligence[.]

Md. Code Ann., Bus. Occ. & Prof. § 17-532(b)(1)(v)-(vi).

In the Statement of Charges and Order for Hearing dated August 31, 2018, the REC cites to COMAR 09.11.01.07 as one of the regulations that the Respondent violated. The REC included the language of the regulation in the Statement of Charges and Order for Hearing, as follows:

Licensees shall maintain adequate records of all real estate transactions engaged in by them as licensed real estate brokers or salesmen. If a licensee has custody or possession of money belonging to others, in the absence of proper written instructions from the parties involved in the transaction to the contrary, these funds may not be intermingled with funds belonging to the licensee, but rather they shall be deposited and retained as required in a non-interest bearing escrow account clearly designated as containing funds held for others. The records of transactions, including bank accounts or deposit referred to in these regulations, shall be available during usual business hours for inspection by the Commission, its field representatives or other employees.

However, effective June 1, 2017, the REC made a series of changes to COMAR 09.11.01 - General Regulations. At the time of the Statement of Charges and Order for Hearing, the above-cited regulatory language had been amended and recodified, as follows:

.05 Records of Transactions.

If a licensee has custody or possession of money belonging to others, in the absence of proper written instructions from the parties involved in the transaction to the contrary, they shall be deposited and retained in a non-interest-bearing escrow account clearly designated as containing funds held for others.

COMAR 09.11.01.05.

The Respondent failed to appear at the hearing and therefore did not argue that notice was deficient with respect to this charge. The Administrative Procedure Act requires an agency to “give reasonable notice of the agency’s action.” Md. Code Ann., State Gov’t § 10-207(a) (2014).¹ Here, the regulation cited by the REC in its Statement of Charges and Order for Hearing pertained generally to record-keeping requirements for licensees. Included within the

¹ All subsequent references to the State Government Article in this Decision are to the 2014 Replacement Volume.

something is more likely so than not so[,]” when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

The essential facts in this case are not disputed. The REC submitted a licensing history showing that the Respondent became licensed as a real estate agent in 2009. The documentary evidence and the testimony of the REC’s witnesses, the Claimant and Mr. Richardson, establish that the Claimant entered into a brokerage agreement with the Respondent on August 5, 2017, and that same day executed a contract of sale for the Property, which was being sold as a short sale. The Brokerage Agreement specifies that the Respondent is entitled to compensation in the amount of 3% of the purchase price if the Claimant purchases any property during the term of the Brokerage Agreement. The Brokerage Agreement defined purchase as including a written offer which has been accepted by the seller of the property. The Brokerage Agreement is silent as to whether compensation is due in a short sale where a seller of property accepts an offer but fails to secure third party approval for the short sale.

Here, the seller accepted the Claimant’s offer. However, the seller’s acceptance was subject to third party approval by Wells Fargo, since the transaction involved a short sale. That same day, the Claimant signed a \$1,000.00 earnest money deposit check made out to James Realty LLC. This first check was never cashed by the Respondent. The Claimant signed another \$1,000.00 earnest money deposit check made out to Jems Realty, which is the correct name of the Respondent’s brokerage, on August 21, 2017. Subsequently, Wells Fargo denied the seller’s request for a short sale.

With respect to the deposit, the documentary evidence and testimony of the REC’s witnesses establish that the Respondent never returned the money to the Claimant. In her email to the Claimant informing him of the fact that Wells Fargo had denied the seller’s request for a short sale, the Respondent stated: “I’ve included a mutual release for your deposit whereby you

erroneously-cited regulatory language was a requirement that money belonging to others be deposited and accounted for in a particular manner.

The crux of the erroneously-cited regulatory language that now forms the basis of COMAR 09.11.01.05 is also present in Business Occupations and Professions Article, Sections 17-322(b)(22) and Section 17-532(b)(1)(v). For that reason, I conclude that, despite the error with respect to COMAR 09.11.01.07, the REC provided the Respondent with reasonable notice and apprised her of the charges warranting disciplinary action in sufficient detail to enable the Respondent to defend against the charges. *See Reed v. Baltimore*, 323 Md. 175, 184 (1991); *Regan v. State Bd. of Chiropractic Examiners*, 355 Md. 397 (1999). Accordingly, I will proceed in the Respondent's absence and evaluate whether the evidence supports a violation of the applicable regulation in effect at the time of the Statement of Charges, which was COMAR 09.11.01.05.

COMAR 09.11.02.01 provides, as pertinent here:

C. The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.

COMAR 09.11.02.02 provides, as pertinent here:

A. 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.

The REC bears the burden of establishing, by a preponderance of the evidence, that the Respondent committed the violations alleged in the Statement of Charges. COMAR 09.01.02.16A. To prove something by a "preponderance of the evidence" means "to prove that

agree to my keeping that deposit as partial payment of my commission earned under our agency agreement.” After the Claimant terminated the Brokerage Agreement and requested the immediate release of the Deposit by the Respondent, the Respondent offered to return \$500.00 to the Claimant. Then, the Respondent offered to return the Deposit funds to him if he signed a release and sent it to her within thirty days of mailing the notice. She also informed him that if she did not receive the signed release then she would keep the Deposit funds as payment for commission earned under the Brokerage Agreement. The Claimant signed and sent the release to the Respondent. Finally, the Respondent sent a notice to the Claimant indicating that she had never received the release and that she would be keeping the Deposit funds as compensation for commission earned under the Brokerage Agreement.

Mr. Richardson, an auditor for the REC, testified that after months of delay, the Respondent provided escrow account statements to him and the statements showed that the Respondent withdrew the \$1,000.00 from her escrow account in two installments of \$500.00, one occurring the date she received the check (August 21, 2017) and the other occurring two days later (August 23, 2017).

The Real Estate Brokers Act (Brokers Act), Md. Code Ann., Bus. Occ. & Prof. §§ 17-101 through 17-702, establishes certain obligations regarding trust accounts at Subtitle 5, Part 1. The Brokers Act defines trust money as:

a deposit, payment, or other money that a person entrusts to a real estate broker or, on behalf of a real estate broker, to an associate real estate broker or a real estate salesperson to hold for:

- (1) the benefit of the owner or beneficial owner of the trust money; and
- (2) a purpose that relates to a real estate transaction involving real estate in the State.

Bus. Occ. & Prof. § 17-501(c).

Clearly, the Deposit fits the definition of trust money, since it is a “deposit, payment . . . or . . . money” that the Claimant entrusted to the Respondent, a real estate broker, to hold for the

benefit of the owner or beneficial owner of the trust money. As such, the Respondent was required to act in accordance with the trust account requirements of the Brokers Act, including the requirement that a broker deposit trust money not more than seven business days after acceptance of a contract of sale by both parties in an account that is separate from the broker's own account and is solely for trust money. Md. Code Ann., Bus. Occ. & Prof. § 17-502(b)(1).

The REC argued that the Respondent failed to comply with the above requirement because she received a check made out to "James Realty LLC" on August 9, 2017, and waited until August 21, 2017, to inform the Claimant that he needed to send a new check made out to JEMS Realty. However, the Claimant's testimony on this point was less than clear, and I do not give it much weight, nor can I infer from his testimony that the Claimant waited until August 21 to notify him of the incorrect payee on the initial check.

However, with respect to the second check that the Claimant submitted, the Respondent clearly failed to account for the Deposit in the manner required by the Brokers Law. Mr. Richardson testified that, based on his review of the escrow bank statement submitted by the Respondent, he was able to determine that she placed the Deposit in an escrow account on August 21, 2017, and then withdrew the Deposit in two equal installments of \$500.00, one on that same day and the second on August 23, 2017. Based on this uncontroverted testimony, the Respondent failed to deposit and maintain the trust money in an escrow account as required by the Brokers Law. Md. Code Ann., Bus. Occ. & Prof. § 17-502(b)(1). In subsequently converting the Deposit funds to her personal use based on her belief that she had earned a commission, she also violated the requirement that "[a] real estate broker may not use trust money for any other purpose other than that for which it is entrusted to the real estate broker." *Id.* § 17-502(b)(2). Based on the foregoing, the Respondent failed to account for trust money in accordance with the requirements of the Brokers Act and therefore violated Business Occupations and Professions Article, Sections

17-322(b)(22) and 17-532(b)(1)(v).² Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b)(22) and 17-532(b)(1)(v).

The REC also charged the Respondent with violating COMAR 09.11.01.07, on the basis that she had failed to maintain adequate records and had not permitted the REC to examine her records pertaining to the Property. At the time of the Statement of Charges, and today, COMAR 09.11.01.07 pertained to change of business location. The regulatory language cited by the REC had been amended and recodified, and the language in effect at the time of the Statement of Charges and today requires licensees to deposit and retain money belonging to others in an escrow account clearly designated as containing funds held for others. By transferring the Deposit funds out of her escrow account almost immediately after receiving the Deposit funds, the Respondent violated COMAR 09.11.01.05. She did not violate COMAR 09.11.01.07.

I also conclude that the Respondent failed to exercise reasonable care and diligence by failing to comply with the Broker's Law provisions pertaining to trust account requirements. These requirements constitute the industry standard of care for trust money. Therefore, the Respondent also violated Business Occupations and Professions Article, Section 17-532(b)(1)(vi). Md. Code Ann., Bus. Occ. & Prof. § 17-532(b)(1)(vi).

The remaining charges pertain to the Respondent's responsibilities under the REC's Code of Ethics, codified at COMAR 09.11.02. At all times relevant to this matter, the Respondent has asserted that she is entitled to keep the Deposit funds as an earned commission, despite multiple requests from the Claimant that she return the Deposit funds to him. She failed to cooperate with the Commission's investigator, only responding to the REC after multiple unsuccessful site visits by the Commission's investigator to JEMS Realty, followed by letters from the REC's legal counsel. The above actions demonstrate that the Respondent failed to protect the public against

² The REC did not charge the Respondent with a violation of Business Occupations and Professions Article, Section 17-502. Md. Code Ann., Bus. Occ. & Prof. § 17-502.

unethical practices in the real estate field. Certainly, her actions were damaging to the public, including the Claimant, and to the dignity and integrity of the real estate profession. The above facts also demonstrate that the licensee failed to assist the commission in its investigation. For all these reasons she violated COMAR 09.11.02.01C.

The Code of Ethics also requires a licensee to protect and promote the interests of the client and requires absolute fidelity to the client's interest. COMAR 09.11.02.02A. The Respondent clearly violated this requirement. Her communications with the client show that her failure to return the Deposit funds was intentional and lacked any legal basis. By the Respondent's own admission, the transaction was terminated by the seller in early November 2017 because of the lack of third-party approval for the short sale. At that point in time, she was permitted under the Brokers Act to return the deposit to the Respondent. Md. Code Ann., Bus. Occ. & Prof. § 17-505(a)(1). It would have been in the interest of the client for the Respondent to return the Deposit funds to him. She failed to do so, and her actions in stringing the client along under the belief that she might perhaps return the deposit demonstrate that she was more concerned with her own interest at the expense of the client's interest.

Since I have concluded that the REC has met its burden of proof with respect to the charged violations of Business Occupation and Professions Article, Sections 17-322(b)(22), (25), 17-532(b)(1)(v)-(vi), and COMAR 09.11.01.05, 09.11.02.01C, and 09.11.02.02A, I further conclude that the REC has also met its burden of proof with respect to Sections 17-322(b)(32)-(33). Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(32)-(33).

The REC argued that a \$4,000.00 penalty and a revocation of the Respondent's license was the proper sanction for the above-referenced violations. The Commission is required to consider the following factors to determine the amount of the penalty imposed:

- (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.

Md. Code Ann., Bus. Occ. & Prof. § 17-322(c)(2).

In considering the factors laid out in subsection 17-322(c)(2) for the imposition of a monetary fine, the REC argues that the violations were serious in nature and resulted in actual monetary harm to the Claimant. The REC asserts that the Respondent did not act in good faith as demonstrated by the fact that she ignored the Commission's investigator and did not appear at the hearing. The REC did note that the Respondent has no previous violations. The REC urges that each statutory or regulatory violation warrants a separate \$5,000.00 fine, but grouped certain violations together for the purpose of arriving at a recommended penalty, as follows: (1) Business Occupation and Professions Article, Sections 17-322(b)(22) and 17-532(b)(1)(v) - \$1,000.00 combined; (2) 17-322(b)(25) and 17-532(b)(1)(vi) - \$1,000.00 combined; (3) COMAR 09.11.01.07 - \$1,000.00; (4) COMAR 09.11.02.01C - \$1,000.00; and (5) COMAR 09.11.02.02A - \$1,000.00.

I agree with the REC regarding the seriousness of the violations, and therefore concur that a \$4,000.00 penalty is warranted. This amount takes into account the seriousness of the violations, the harm caused by the Respondent's conduct and the bad faith she exhibited, but weighs against those factors the lack of any previous violations and the fact that all the violations stem from a single transaction. In addition, I have considered the purpose of a penalty, which is to deter future bad acts by a licensee but also to protect the public. *Garrity v. Maryland State Bd. of Plumbing*, 447 Md. 359, 387-388 (2016) (citations omitted). Where, such as here, the violations go to the heart of the licensee's fiduciary obligation, the risk of harm to the public is greater. For that reason, the \$4,000.00 penalty amount is warranted even though it is

proportionally larger than the actual loss suffered by the Claimant, as discussed below. For the above-stated reasons, I also agree with the REC's recommended sanction of a revocation.

The Guaranty Fund Claim

Section 17-404 of the Business Occupations and Professions Article governs claims brought against the Fund and sets forth, in pertinent part, the following criteria that must be established by a claimant to obtain an award:

(a) In general.-

(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; 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.

(b) The amount recovered for any claim against the Guaranty Fund may not exceed \$50,000 for each claim.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)-(b).

With respect to claims against the Fund, COMAR 09.11.01.14 states:

The amount of compensation recoverable by a claimant from the Real Estate 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. 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.

Under Section 17-407(e) of the Business Occupations and Professions Article, the Claimant bears the burden of proof to establish his claim for recovery from the Fund. Md. Code

Ann., Bus. Occ. & Prof. § 17-407(e). The burden of proof, as in the case of the regulatory charges above, is also by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217; COMAR 09.01.02.16C.

The uncontested facts establish that that the Respondent was a licensed real estate broker at the time of the underlying transaction, that the transaction related to residential real estate located in the State of Maryland, and that the Respondent's acts occurred during the provision of real estate brokerage services, defined, *inter alia*, as including assisting another person to locate for purchase any residential real estate. Md. Code Ann., Bus. Occ. & Prof. § 17-101(l). Further, the Claimant has no business or familial relationship with the Respondent that would disqualify them from recovery. *See* Md. Code Ann., Bus. Occ. & Prof. § 17-404(c).

A Claimant must also prove that either money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or that the agent's actions constituted fraud or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(iii). The Claimant alleges that the Respondent improperly retained the Deposit funds following the termination of the transaction. The Fund further argues that the Respondent's actions constituted misrepresentation because she misrepresented what the Deposit funds were to be used for.³ I conclude that the Claimant has proven that the Respondent obtained the Deposit funds from him by embezzlement, rather than theft. Therefore, I conclude that the Claimant has proven that he is entitled to an award from the Fund.

Maryland, along with at least thirty-five other states, has enacted a consolidated theft-related statute that creates a single statutory crime encompassing various common law

³ Neither the Claimant nor the Fund argued that the Respondent committed forgery.

theft-type offenses. *Jones v. State*, 303 Md. 323, 333 (1985). The resulting statutory crime of theft prohibits the following conduct, in pertinent part:

(a) A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:

(1) intends to deprive the owner of the property;

(2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

(b) A person may not obtain control over property by willfully or knowingly using deception, if the person:

(1) intends to deprive the owner of the property;

(2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

Md. Code Ann., Crim. Law § 7-104(a)-(b) (Supp. 2018). The requirement of intentional deprivation makes theft a specific intent crime. *Id.* at 340. Intent may be inferred from acts occurring subsequent to the commission of the alleged crime. *State v. Coleman*, 423 Md. 666, 674 (2011). However, when a defendant has a right to receive money or property, he cannot be guilty of stealing it. *Id.* at 675 (citations omitted).

Here, the Contract required the Claimant to make a deposit by way of a \$1,000.00 check made out to the Respondent's brokerage. The Contract stated that the Claimant and seller instruct the Respondent to place the Deposit funds in an escrow account. As such, the Respondent had the right to receive the Deposit funds pursuant to the Contract. Since the Respondent had a right to receive the money in question at the time of receipt, she cannot be guilty of theft. *Id.*

In addition to the statutory crime of theft, Subtitle 1 of the Criminal Law Article includes other crimes involving theft. One of those crimes is embezzlement – fraudulent misappropriation by fiduciaries,⁴ which prohibits the following:

(a) 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.

Md. Code Ann., Crim. Law § 7-113(a) (2012). To convict a defendant for misappropriation by a fiduciary, the state is required to prove not only existence of fiduciary relationship, but also existence of specific intent of fraud and willfulness on defendant's behalf. *Schwartz v. State*, 103 Md. App. 378, 386 (1995).

To determine whether the Respondent's actions constituted embezzlement, it is necessary to first address the question of whether the Deposit funds belonged to the Claimant after the seller terminated the transaction. On this preliminary point, I conclude that the Claimant has proven that he was entitled to the return of the deposit.⁵

As noted above, the trust account provisions of the Brokers Act clearly permit an agent to return the deposit to the buyer in the event that the transaction is terminated, as occurred here. Md. Code Ann., Bus. Occ. & Prof. § 17-505(a)(1). There is no indication that the buyer had any claim to the Deposit funds. This is especially true in light of the uncontested fact that it was the

⁴ This crime is distinguishable from the common law crime of embezzlement, which was combined into the single statutory crime of theft.

⁵ I reach this conclusion despite the language in Paragraph 20 in the Contract which purports to govern the disposition of the deposit. The language stipulates that the deposit may only be released with the consent of the buyer and seller, or at the Respondent's own discretion. The Respondent shall not be permitted to use this contractual provision, meant to ensure that a dispute between the buyer and the seller as to ownership of the deposit is resolved in a mutually agreeable manner or in a manner allowed by law, to appropriate funds that do not belong to her under the guise that she is not permitted to release the Deposit funds.

seller's failure to obtain third-party approval for the short sale that caused the transaction to terminate.

It is well settled under Maryland law that a real estate agent owes a fiduciary duty to that agent's client. *Wilkins Square, LLLP v. W.C. Pinkard & Co., Inc.*, 189 Md. App. 256, 267-268 (2009) (citations omitted). The record also contains ample evidence of the Respondent's fraudulent intent and willfulness, including the fact that she transferred the money out of the escrow account within three days of depositing it, that she informed the Claimant of her intent to appropriate the money to her own benefit as a commission at the same time she informed him that the transaction had been terminated, and that she has consistently stated in her subsequent communications with the Claimant and the REC that she is entitled to the Deposit funds as an earned commission. This conduct demonstrates that the Respondent acted contrary to the requirements of her trust responsibility by failing to return the Deposit funds to the Claimant. For the reasons discussed above, I therefore conclude that the Claimant has proven that the Claim is based on an act in which money was obtained from a person by embezzlement. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(iii)(1).

Having concluded that the Claimant has proven all the requirements for a Fund claim, I turn now to the amount of actual loss. The Claimant argues that he was entitled to the return of the \$1,000.00 in Deposit funds that the Respondent retained. I agree that the Claimant's actual loss totaled \$1,000.00.

PROPOSED CONCLUSIONS OF LAW

Based on the Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated subsection 17-322(b)(22), (b)(25), (b)(32) and (b)(33); and subsection 17-532(b)(1)(v) and (vi) of the Business Occupations and Professions Article, and COMAR 09.11.01.05, 09.11.02.01C, and 09.11.02.02A. Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b)(22),

(25), (32)-(33), 17-532(b)(1)(v)-(vi). I further conclude that the Respondent did not violate COMAR 09.11.01.07. I further conclude that the REC should revoke the Respondent's real estate agent's license and impose a total penalty of \$4,000.00. Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b), (c).

Based on the Findings of Fact and Discussion, I conclude as a matter of law that the Claimant is entitled to an award from the Fund in the amount of \$1,000.00 for the actual loss he sustained as a result of embezzlement by the Respondent, in her capacity as a licensed real estate broker, in connection with the sale of the Property. Md. Code Ann., Bus. Occ. & Prof. § 17-404; COMAR 09.11.01.14.

RECOMMENDED ORDER

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

(1) That the Respondent's real estate agent license be revoked;

(2) That the Respondent pay a civil penalty in the amount of \$4,000.00;

(3) The Maryland Real Estate Commission Guaranty Fund pay the Claimant \$1,000.00 as the amount of his actual loss from the Respondent's wrongful acts or omissions;

and

(4) That the records and publications of the Maryland Real Estate Commission reflect this decision.

February 12, 2019
Date Decision Issued

SIGNATURE ON FILE

Brian Patrick Weeks
Administrative Law Judge

BPW/dlm
#177337