

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**IN THE MATTER OF THE CLAIM
OF ROBERT BALUM,
CLAIMANT**

v.

**THE MARYLAND REAL
ESTATE COMMISSION
GUARANTY FUND FOR THE
ALLEGED MISCONDUCT OF
DAVID HERBST, RESPONDENT**

CASE NO. 2019-RE-150

OAH NO. DLR-REC-22-19-03956

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated July 15, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 21st day of August, 2019, hereby **ORDERED**:

A. That the Findings of Fact in the recommended decision be, and hereby are **AFFIRMED**.¹

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

C. That the Recommended Order in the recommended decision be, and hereby is, **ADOPTED** and **AMENDED** as follows:

ORDERED that once this Proposed Order becomes a Final Order and all rights to appeal are exhausted, the Claimants, **Robert Balum**, be reimbursed from the Maryland Real Estate Guaranty Fund in the amount of **One Thousand Nine Hundred Forty Dollars (\$1,940.00)**;

¹ The Commission notes the following harmless typographical error requiring correction for clarity only:

- On page 2 of the recommended decision the ALJ identifies exhibits including GF Ex.4 which is dated April 18, 2019, not March 14, 2019.

ORDERED that all real estate licenses held by the Respondent, **David Herbst**, shall be suspended from the date this Proposed Order becomes a Final Order and all rights to appeal are exhausted and shall not be reinstated until the Maryland Real Estate Guaranty Fund is reimbursed, including any interest that is payable under the law and application for reinstatement is made;

D. That the records, files, and documents 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 recommended decision of the Administrative Law Judge required modification because it omitted from the Recommended Order that Respondent's license be suspend until the Maryland Real Estate Guaranty Fund (and any interest) is repaid and included a minor typographical error.

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 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.

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

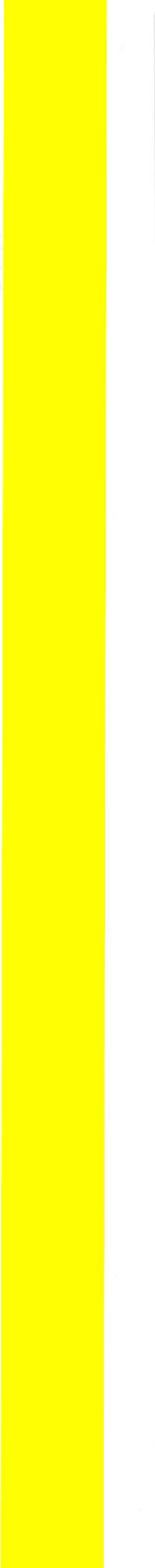
MARYLAND REAL ESTATE COMMISSION

August 21, 2019
Date

By: SIGNATURE ON FILE

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On February 1, 2019, the REC issued an Order for Hearing. On February 4, 2019, the REC transmitted the matter to the Office of Administrative Hearings (OAH) for a hearing on the Claimant's claim against the Fund.

On April 22, 2019, I conducted a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2018). The Claimant represented himself. The Respondent represented himself. Andrew Brouwer, Assistant Attorney General for the Department of Labor, Licensing and Regulation (DLLR), represented the Fund.

The Administrative Procedure Act, the procedural regulations of the DLLR, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); Code of Maryland Regulations (COMAR) 09.01.02, 09.01.03, 09.11.03.02; and COMAR 28.02.01.

ISSUES

The issues are whether the Claimant sustained an actual loss as a result of an act or omission of the Respondent that constitutes theft, embezzlement, false pretenses, forgery, misrepresentation, or fraud; and, if so, the amount of the loss.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence on behalf of the Fund:

- GF Ex. 1 Hearing Order, 2/1/19
- GF Ex. 2 Notice of Hearing, 2/13/19
- GF Ex. 3 Complaint, 9/12/18
- GF Ex. 4 The Respondent's licensing history, 3/14/19

I admitted the following exhibits into evidence on behalf of the Claimant:

- Cl. Ex. 1 Photograph of condominium building; Table of Contents; Notice of Hearing, 2/13/19; Hearing Order, 2/1/19; Complaint filed on line, 9/12/18; Letter to the Claimant from the REC, 9/13/18; Rental agreement between the Claimant and the Respondent, 9/18/17; Photograph of reservation calendar for the Claimant's unit from the Respondent's website; Statements from the Respondent, 4/10/18, 6/10/18, 7/10/18, 8/1/18; Handwritten list of monies the Respondent owes to the Claimant for rentals; Letter from the Respondent's brother, 9/7/18; and Receipts from Shore Cleaning Services, 8/4/18, 8/11/18

I admitted the following exhibits into evidence on behalf of the Respondent:

- Resp. Ex. 1 Letter from the Respondent's brother and sister-in-law, 4/22/19
- Resp. Ex. 2 Medical information from Anna T. Monias, M.D., Gilchrist Greater Living at Broadmead
- Resp. Ex. 3 Medical information from Anna T. Monias, M.D., Greater Baltimore Medical Center
- Resp. Ex. 4 Sinai Driving Evaluation and Training Program Recommendations and Follow up, 2/4/19
- Resp. Ex. 5 Driver's License Suspension, 2/8/19
- Resp. Ex. 6 Reporting Officer Narrative, Ocean City Police Department, 9/10/18; Case Supplemental Reports, 11/21/18 and 12/20/18
- Resp. Ex. 7 Notice of foreclosure sale of the Respondent's property located at 7802 Coastal Highway, Ocean City, Maryland, 21842
- Resp. Ex. 8 Notice of Intent to Foreclose on the Respondent's property located at 7804 Coastal Highway, Ocean City, Maryland, 21842

Testimony

The Claimant testified.

The Respondent testified.

The Fund presented no testimony.

FINDINGS OF FACT

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

1. The Claimant is the owner of the Property, a condominium unit located in Ocean City, Maryland.
2. At all times relevant to this case, the Respondent was a licensed real estate broker who provided property management services, handling the rentals of condominium units in Ocean City, Maryland.
3. On September 18, 2017, the Claimant and the Respondent entered into a rental agreement for the Respondent to act as the exclusive rental agent for the Claimant.
4. Under the agreement, the Respondent collected rental payments and deposits from tenants on behalf of the Claimant. The Claimant paid the Respondent 15% of the gross rental for weekly rentals the Respondent obtained.
5. The Respondent obtained tenants and collected rent for the following weeks on behalf of the Claimant: August 4 through 11, 2018; August 11 through 18, 2018; and August 25 through September 1, 2018.
6. The Claimant charged \$1,325.00 per week for August 4 through 11, 2018 and August 11 through 18, 2018. The Claimant charged \$1,000.00 per week for August 25 through September 1, 2018.
7. After subtracting the Respondent's 15% commissions, the Claimant should have received \$3,102.50 for the rentals ($\$1,325.00 + \$1,325.00 + \$1,000.00 = \$3,650 \times .85 = \$3,102.50$).
8. The Respondent remitted \$1,162.50 to the Claimant.
9. The Respondent still owes the Claimant \$1,940.00.

DISCUSSION

The burden of proof at a hearing on a claim against the Fund is on the “claimant to establish the validity of the claim.” Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2018). Section 17-404 of the Business Occupations & Professions article governs all claims brought against the Fund and sets forth the following criteria that must be established by a claimant to obtain an award:

(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; 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) (2018). *See also* COMAR 09.11.01.14.

The Claimant in this case testified and submitted documents showing that the Property was rented through the Respondent during the weeks of August 4 through 11, 2018; August 11 through 18, 2018; and August 25 through September 1, 2018. The Claimant also submitted evidence showing the total amount he was owed and the partial payments he received from the Respondent. The evidence shows the Respondent still owes the Claimant \$1,940.00.

The Respondent testified that he had a number of strokes that affected his memory and now has dementia. He submitted documentation regarding his medical condition. He stated that

he did not intentionally take money from his customers and apologized. However, he could not explain what happened to the money he owed the Claimant. Further, the Respondent has not paid the Claimant the money he owes him as of the date of the hearing.

The Fund argued that the Respondent agreed to collect money on behalf of the Claimant and disburse those funds to the Claimant but that he failed to do so. The Fund maintained that the Respondent's failure to disburse all the funds collected to the Claimant constituted a misrepresentation. The Fund recommended an award to the Claimant of \$1,940.00.

Therefore, I find the Claimant is entitled to an award from the Fund in the amount of \$1,940.00 for his actual loss based on the Respondent's misrepresentation in the provision of real estate services.

CONCLUSIONS OF LAW

Based on the above Findings of Fact and Discussion, I conclude as a matter of law that the Claimant sustained an actual loss compensable by the Fund due to an act or omission of the Respondent in which money was obtained on behalf of the Claimant but not remitted in full to the Claimant, which constitutes misrepresentation in the provision of real estate services. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2) (2018). I further conclude as a matter of law that the Claimant is entitled to receive an award from the Fund in the amount of \$1,940.00. *Id.*; COMAR 09.11.01.14.

RECOMMENDED ORDER

I PROPOSE that the Claim filed by the Claimant against the Maryland Real Estate Guaranty Fund be GRANTED in the amount of \$1,940.00.

July 15, 2019
Date Decision Issued

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Lorraine E. Fraser
Administrative Law Judge

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