BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION	*	
	*	
v.	*	**CASE NO. 2017-RE-012**
WILL STEIN, **Respondent**	*	
And	*	**OAH NO. DLR-REC-24-18-24239**
THE CLAIM OF NOEL WILLIAMS AGAINST THE MARYLAND REAL ESTATE GUARANTY FUND	*	
	*	

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

PROPOSED ORDER

The Findings of Fact, Proposed Conclusions of Law and Recommended Order of the Administrative Law Judge dated January 30, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 25th day of February, 2019

ORDERED,

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

ALL. Claimant's Exhibit No. 6 (CLMT #6) is dated July 5, 2016.

17. On July 5, 2016, the Claimant and the Respondent had further communication about the Property. The respondent told the Claimant that the entire interior of the Property would have to be painted. The Claimant asked about the cost of the painting. The Respondent said he would send an invoice, which Claimant received later in the day on July 5, 2016. The invoice was for $4.360.00.

29. New carpet was installed at the Property. The cost for the carpet

replacement was $2,784.00.

DISCUSSION. Last sentence, 1st full paragraph, page 11. Although the Respondent did not know this was a topic in dispute until well into the hearing, the security deposit record he entered into evidence shows the date the lease began as May 3, 2015, and the date the lease ended as May 31, 2016, consistent with his recollection of events. RESP #1.

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

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

ORDERED that the Respondent, Will Stein, shall be reprimanded;

ORDERED that the Respondent, Will Stein, shall be assessed a civil penalty in the amount of **Five Thousand Dollars ($5,000)**, which shall be paid to the Real Estate Commission within thirty (30) days of the date of this Order;

ORDERED that all real estate licenses held by the Respondent, Will Stein, shall be suspended until the civil penalty is paid in full, including any interest that is payable under the law; and

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

D. 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 (1) certain facts required correction, (2) it omitted a provision that the civil penalty be paid within a specified time period and (2) it omitted suspension of all licenses held by the Respondent until the civil penalty is paid.

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

25 February 2019
Date

By: SIGNATURE ON FILE

MARYLAND REAL ESTATE	*	**BEFORE KIMBERLY FARRELL,**
COMMISSION	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE OF**
WILL STEIN,	*	**ADMINISTRATIVE HEARINGS**
RESPONDENT,	*	
		OAH No.: DLR-REC-24-18-24239
and	*	
		REC No.: 2017-RE-012
IN RE THE CLAIM OF NOEL	*	
WILLIAMS AGAINST THE	*	
MARYLAND REAL ESTATE	*	
GUARANTY FUND	*	

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

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 August 15, 2016, Noel Williams (Claimant) filed a complaint against licensed real estate broker Will Stein (Respondent). That same day, the Claimant also filed a claim for compensation from the Real Estate Guaranty Fund (Fund) for losses the Claimants allegedly sustained as a result of the Respondent's misconduct. The complaint and claim both arose out of interaction between the Claimant and the Respondent as it related to 14903 Rock Castle Street, Laurel, Maryland, the address of a home owned by the Claimant at the times relevant to this case as detailed below.

The Maryland Real Estate Commission (REC or Commission) investigated the complaint and determined that charges against the Respondent were warranted and that the Claimant was entitled to a hearing on his claim. Accordingly, the Commission issued a Statement of Charges and Order for Hearing (Statement of Charges), dated July 30, 2018, against the Respondent. The Statement of Charges set forth information about the claim and alleged that the Respondent violated subsections 17-322(b)(25), (32), (33) of the Business Occupations and Professions article (Business Occupations Article) of the Maryland Code and that he also violated section 09.11.02.02A of the Code of Maryland Regulations (COMAR). The Statement of Charges advised the Respondent that if the charged violations are substantiated, the Commission could sanction him by suspending or revoking his real estate broker's license and could, in addition to or instead of those actions, impose a monetary penalty. On July 31, 2018, the Commission forwarded the Statement of Charges to the Office of Administrative Hearings (OAH) to conduct a hearing.

On November 2, 2018, I conducted the hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Profs. §§ 17-324(a) and 17-408(a) (2018). Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the REC on the charged violations. The Claimant represented himself. Paul Balassa, Esquire, represented the Respondent. Hope Sachs, Assistant Attorney General, DLLR, represented the Fund.

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. Did the Respondent engage in conduct that demonstrated bad faith, incompetency, or untrustworthiness, or that constituted dishonest, fraudulent, or improper dealings in violation of Business Occupations Article § 17-322(b)(25)

2. Did the Respondent violate COMAR 09.11.02.02A, the REC's Code of Ethics (Code), by failing to protect and promote the interests of his client or by failing to act with absolute fidelity to the client's interest, which would violate the Code and also Business Occupations Article§ 17-322(b)(33)?

3. If the Respondent violated any of these provisions, what sanction, if any, is appropriate?[1]

4. Has the Claimant established a compensable claim against the Fund under section 17-404 of the Business Occupations Article?

5. If the Claimant has established a compensable claim, what is the appropriate award?

SUMMARY OF THE EVIDENCE

Exhibits

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

REC #1	Statement of Charges, July 30, 2018
REC #2	Notice of Hearing generated by the OAH, September 19, 2018
REC #3	REC Complaint and Guaranty Fund Claim, received by the REC August 15, 2016
REC #4	REC licensing records for the Respondent and related companies, printed November 1, 2018
REC #5	Property Management and Exclusive Rental Agreement, March 31, 2015
REC #6	Exclusive Right To Sell Residential Brokerage Agreement, March 30, 2016
REC #7	Able Home Invoice #544, July 5, 2016

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

CLMT #1	Georgia Residential Lease Agreement, May 2, 2015
CLMT #2	Comparative Market Analysis, July 11, 2016

[1] The Statement of Charges also charged a violation of Business Occupations Article § 17-322(b)(32). Mr. Brouwer indicated that this charge is encompassed by the others and does not need to be separately addressed.

CLMT #3 Series of emails between the Claimant and the Respondent, July 12, 2016
CLMT #4 Caton Carpet & Upholstery Cleaning Customer Service work order contract, July 8, 2016
CLMT #5 Email regarding a lockbox, August 3, 2016
CLMT #6 Email invoice from Able Home, August 10, 2016
CLMT #7 Wells Fargo statement, July 11, 2016
CLMT #8 Printout of a photograph
CLMT #9 Exclusive Right To Sell Residential Brokerage Agreement between the Claimant and Keller Williams, August 1, 2016

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

RESP #1 Security Deposit Ledger, issued June 28, 2016
RESP #2 Google voice log[2]
RESP #3 Response to Complaint, undated[3]

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

Testimony

The REC presented testimony from the Claimant on the regulatory charges. The Claimant also testified on his own behalf in support of his claim. The Respondent testified on his own behalf.

FINDINGS OF FACT

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

1. At all times relevant to this case the Respondent was licensed as a Real Estate Broker by the REC under license number 641331.

2. The Respondent was the owner and the broker of record for Belair Realty.

3. In 2013, the Claimant purchased a newly constructed townhome at 14903 Rock Castle Street in Laurel, Maryland (Property). He resided there until 2015 when he decided to move to another state due to a job transfer. The Claimant desired to sell the Property, but after

[2] The voice log was admitted only as to the name of the caller, the date of the call, and the length of the call. The material purporting to be a transcription of the calls was not admitted.
[3] This exhibit was admitted as the Respondent's answer to the Claimant's complaint, which he submitted to the REC within thirty days of receiving the complaint.

investigating that prospect, determined that market conditions were unfavorable for a sale at that time, so he decided to rent the property temporarily and wait until market conditions improved.

4. On March 31, 2015, the Claimant and the Respondent entered into a contract for the Respondent to manage the rental of the Property through Belair Realty.

5. The Respondent secured a tenant who lived at the Property beginning in early May 2015. The lease was initially set to last for one year – May 2015 through the end of April 2016. The tenant paid monthly rent of $2,149.00, which covered the Claimant's mortgage payments which were roughly $2,112.00.[4]

6. After one year of renting the Property, the Claimant decided to sell it. On March 30, 2016, the Claimant and the Respondent entered into an agreement entitled Exclusive Right to Sell Residential Brokerage Agreement (Agreement).

7. The listing term under the Agreement was May 1, 2016 through August 31, 2016.

8. After the Agreement was signed, the tenant was permitted to stay in the Property for an additional month, vacating on or about May 31, 2016.[5]

9. The Agreement contained a provision for "Coming Soon Listing Status." It provided:

> The "Coming Soon" listing status is an option for properties listed in the MLS[6] that are not available but will be soon....If Seller selects this status, the listing agent must enter an expected on-market date in the MLS that can be no later than 21 days from when the listing was submitted to the MLS. The "Coming Soon"

[4] The Claimant testified that his mortgage payment was $2,103.60 and then went up slightly to $2,112.55. It is not clear when the change occurred.

[5] The parties do not agree on when the tenant actually moved out. The Claimant testified that the tenant moved out at the end of her lease which was up the last day of April 2016. The Respondent testified that the tenant was a woman who had a baby during the period of the lease. He reported that she requested and the Claimant approved her staying through the last day of May 2016 – a period of one month beyond her original lease. The security deposit statement in evidence as RESP #1 documents a lease period from May 3, 2015 through May 31, 2016. The Claimant was adamant that he had been wanting to sell the house for a year and that he tried to get the Respondent to begin fixing up and showing the house before the original lease was even up in April, so there is no way he would have agreed to such an extension. He further testified that he did not receive any rent money from May 2016. I find that it is more likely that the tenant stayed the extra month than that she did not. I make no finding about who authorized or approved the extension.

[6] According to the Agreement, MLS stands for multiple listing service(s).

status will automatically update to "active" on the expected on-market date if not made "active" sooner."

REC #6, pg. 3 of 7, paragraph 7(e).

10. For this provision to be in effect, the Claimant had to separately initial the contract on a space provided next to the clause, which he did. The Respondent knew this contract provision was signed by the Claimant.

11. The Claimant expected the Property to be listed as coming soon on May 1, 2016, and to be listed as active on or around May 22, 2016.

12. The Respondent did not list the Property as coming soon.

13. The Respondent did not list the Property as active.

14. The Claimant was paying rent in Georgia and his mortgage for the Property (mostly covered by the rent payments). This situation created a financial strain for him. Additionally, the Claimant found a residence in Georgia that he wanted to purchase which he could not do as long as he still owned the Property.

15. The Respondent advised the Claimant that the carpet in the Property needed to be replaced. The Claimant believed that it should be cleaned rather than replaced. There was communication back and forth about this topic.

16. There was disagreement between the Claimant and the Respondent about what could legally be done with the tenant's security deposit, and how best to handle those funds. This was discussed on several occasions.

17. On July 5, 2016, the Claimant and the Respondent had further communication about the Property. The Respondent told the Claimant that the entire interior of the Property would have to be painted. The Claimant asked about the cost of the painting. The Respondent said he would send an invoice, which the Claimant received later in the day on July 5, 2016. The invoice was for approximately $4,000.00.

18. The Claimant considered the cost of painting to be outrageous. He was incensed that there had been little or no progress on the Property and that it still was not listed in MLS under any status. As a result, the Claimant purchased round-trip airline tickets and flew from Georgia to Maryland to work on the house himself. The Claimant arrived on July 7, 2016, and stayed until July 10, 2016. During that time, he stayed in a hotel and rented a car. The Claimant arranged for some of the interior of the home to be painted at a cost of approximately $900.00 for labor and approximately $300.00 for paint. He also bought cleaning supplies and cleaned the interior of the Property, including appliances, floors, bathrooms, and windows. The Claimant arranged for a carpet cleaner to clean stained areas of the carpet for $200.00.

19. The carpet cleaner came while the Claimant was in Maryland and cleaned the carpet.

20. There was no sign on the property to show that it was for sale or would soon be for sale. There was no literature available describing the house or its features.

21. In the Property, the Claimant found trash and large items belonging to the former tenant such as a mattress and occasional tables. The Claimant removed these items to help get the Property ready to show.

22. The Claimant returned to Georgia on July 10, 2016.

23. The Agreement fixed the listing price for the Property as $349,000.00. After the Agreement was signed, the Claimant wanted to list the Property for a higher price, $359,000.00, and he conveyed that information to the Respondent. The Respondent believed that $359,000.00 was too high and he suggested that the Claimant stay with $349,000.00 as the listing price.

24. On July 11, 2016, the Claimant, spurred on by his Georgia real estate agent who told him he was being treated poorly by the Respondent, requested that the Respondent provide information he would put in the listing, specifically comparable properties or "comps."

25. The Respondent provided a draft listing in response to the request. The picture included in the material was not of the Respondent's home. The picture was a placeholder the Respondent used as a sample because he intended to have photographs of the Property taken by a professional photographer.[7]

26. The Claimant was angered by the picture on the MLS draft and by other things, including what he perceived to be a cavalier attitude by the Respondent regarding the Claimant's financial distress.

27. Early on July 12, 2016, the Claimant sent an email to the Respondent advising the Respondent that he (the Claimant) was terminating the Agreement. There followed a series of emails between the two men.

28. In the course of the email exchange, the Respondent indicated that the carpet was being replaced. The Respondent believed that the Claimant had authorized replacement of the carpet.[8] The Claimant instructed the Respondent to cancel that job and not to enter the Property. The Respondent attempted to cancel the job, but learned that workers were already on site and had started the work. He advised the Claimant that it was too late to cancel the carpet installation.

29. New carpet was installed at the Property. The cost for the carpet replacement was $2,736.00.

[7] The issue of photographs of the Property was another point of contention between the Claimant and the Respondent. The Claimant asserted that the pictures used for the rental listing could be used for the MLS listing. The Claimant testified that the Respondent wanted professional photographs taken at a cost of $400.00 payable by the Claimant. The Claimant asserted that the Respondent used the wrong picture in his initial rental listing and used the same incorrect picture in the MLS draft. I accept the Respondent's representation that the same picture appeared in both because it was a stock placeholder picture. Further, the Respondent testified that he did not expect the Claimant to pay for the photographer; rather, he indicated that money would have been part of his own marketing expenses. The Respondent further indicated that professional photographs enhance the prospects for selling a property.

[8] The Claimant denied authorizing installation of new carpet. I am not finding as a fact that the Claimant actually authorized the carpet, but I am finding that the Respondent believed that the Claimant authorized it.

30. The Tenant's security deposit plus interest, a total of $2,234.75, was retained and applied towards the cost of replacing the carpet. The tenant was also charged an additional $78.34 for miscellaneous damage to the Property.

31. The difference between the damage done and the money retained was $579.59. The Respondent has not been reimbursed for this shortfall.

32. On August 1, 2016, the Claimant signed an Exclusive Right to Sell Residential Brokerage Agreement with Keller Williams Preferred Properties. The Property was listed for $349,000.00 and sold for that price on September 1, 2016.

DISCUSSION

The Regulatory Charges

The REC charged the Respondent with violating subsections 17-322(b)(25) and (b)(33) of the Business Occupations Article, and COMAR 09.11.02.02A. Section 17-322 of the Business Occupations Article provides, in pertinent part:

> (b) *Grounds.* – Subject to the hearing provisions of § 17-324 of this subtitle, the Commission may . . . reprimand any licensee, or suspend or revoke a license if the applicant or licensee:
>
> . . .
>
> (25) engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings;
>
> . . .
>
> (33) violates any regulation adopted under this title or any provision of the code of ethics[.]
>
> . . .
>
> (c) (1) 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.
> (2) To determine the amount of the penalty imposed, the Commission shall consider:
> (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.

COMAR 09.11.02.02A provides:

> 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 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 starting point for this discussion is that there was a written Agreement signed by the Claimant and the Respondent. The document was a form used by the Respondent and, to the extent that it had blanks to be filled in, the Respondent was the one to fill in those blanks prior to the signing of the agreement. The Agreement, signed March 30, 2016, established that it would be effective May 1, 2016, and that the Property would be listed in MLS in a "coming soon" status, followed by becoming active not more than twenty-one days after the coming soon listing. By July 12, 2016, the date the Claimant terminated the agreement, the Property was not listed in MLS in any status and the Agreement had not been amended. This is objectively unreasonable and demonstrates either incompetency or improper dealings by the Respondent. This is true even if the tenant stayed through May.

It would be very easy to get bogged down in the minutia of this case. Frankly, both sides gave believable presentations if viewed in isolation. When offered as two sides of the same story, it was stunning how the respective versions of what happened clashed on nearly every aspect of the case. It immediately became apparent that there was a serious disconnect between

the Claimant and the Respondent. The points on which they disagree are many, but resolution of most of them is not necessary to making a decision in this case. The key to considering the regulatory charges is the written Agreement.

As noted above, the Claimant stated that he was very keen to sell the Property. He recalls wanting to show the house while the tenant was still in it. The Respondent explained that it was very difficult to keep a house with a baby in it in a proper state for spur-of-the-minute showings and he suggested waiting until the tenant left. The Respondent testified that the tenant asked to be allowed to stay an extra month and that the Claimant approved that request. The Claimant categorically denies being consulted about such a request, much less approving it. He stated that he was being squeezed financially and would not have agreed to extend the tenant's lease. Although the Respondent did not know this was a topic in dispute until well into the hearing, the security deposit record he entered into evidence shows the date the lease began as May 3, 2016, and the date the lease ended as May 31, 2016, consistent with his recollection of events. RESP #1.

The Claimant testified that he consistently and repeatedly advised the Respondent about his financial distress and that the Respondent failed to act in a manner designed to sell the Property as expeditiously as possible. The Respondent countered that the Claimant did not share his dire financial straits with him and that he did not know the Claimant was unhappy with the course of dealings between them until July 2016. The Respondent alleged that, although the Agreement stated a listing price, the Claimant wanted to list the Property for a higher price. The Claimant denied suggesting a higher price. They disagreed about the disposition of the tenant's security deposit. They disagreed about whether the carpet was damaged or just dirty and matted down around furniture.

Both men asserted that written documentation existed to support their respective positions. Neither had much to offer by way of documentation on the day of the hearing. I do not mean to

suggest that it was difficult to believe either the Claimant or the Respondent. The problem was more that it was easy to believe either one, except that they were saying categorically opposite things about a broad range of issues. The Claimant is a veteran and a serious individual who believes he was harmed by the Respondent's cavalier attitude regarding sale of the Property. The Respondent is a real estate broker with an unblemished professional record. He maintains that the Claimant seemed satisfied with the course of dealings between them right up until things went suddenly awry.

Whether the Property became available at the end of April or the end of May, the facts are that by mid-July, the Property was not listed as active or coming soon and it was not in a condition to be shown. Necessary painting had not been done; the carpet had not been cleaned or replaced; and large household objects and some trash littered the inside. There was no realty sign on the property. The Respondent had not arranged for pictures to be taken, although he testified that professional photographs were highly desirable and that he would bear the expense of that undertaking. No sales material was prepared to advertise the Property.

The Respondent raised the notion of the "situational appropriateness" of his actions. He testified that the REC was looking at what was theoretically possible under the Agreement rather than what was appropriate under the circumstances. As the REC pointed out, if the Property was not going to be listed in the expected time frame, or if other provisions were proving difficult or impossible, the Agreement could have been amended in writing. Instead, the Respondent left the Agreement as originally signed, but did not honor its provisions. The Respondent was the licensed professional in this case. He was the person best positioned to avoid precisely the kind of dispute that has resulted. He could have honored the Agreement; he could have amended it; or he could have terminated it. Instead, he kept the Agreement as originally signed and failed to follow its clear provisions.

For these reasons, I find that the REC has proven by a preponderance of the evidence that the Respondent acted in a manner that demonstrated either incompetency or improper dealings.

The REC also charged the Respondent with violating COMAR 09.11.02.02A, which requires that the Respondent protect and promote the interests of the client. COMAR characterizes this as an "obligation of absolute fidelity to the client's primary interest." The Respondent acknowledged that every client wants to sell their property as quickly as possible for as much money as possible. In addition, the Respondent knew that the Claimant wanted to sell his Property in 2015 and that he refrained from that action because of market conditions. He knew that the Respondent lived out-of-state and that he wanted to sell the Property as soon as the lease ended. The Respondent knew the Claimant was making a housing payment in Georgia as well as carrying the Property mortgage without the rental payment to subsidize that cost. The Respondent was far too casual in taking steps to get the Property ready for showing and on the market. He failed to adequately protect and promote the interest of the Claimant in this situation.

The Claimant became so frustrated that he purchased round trip tickets from Georgia to Maryland, rented a car, stayed in a hotel, and worked tirelessly for four days to accomplish most of what the Respondent had failed to make happen in a month and a half. Violating a provision of the Code subjects the Respondent to sanction under the Business Occupations Article. Business Occupations Article § 17-322(b)(33).

The REC recommended that the Respondent be reprimanded and that a penalty of $2,500.00 be imposed for each of the two violations, resulting in a total monetary penalty of $5,000.00. A reprimand is appropriate and I will recommend that sanction. With regard to a monetary penalty, the Respondent has no history of prior violations. The Respondent failed to adhere to the terms of his written Agreement with the Claimant and failed to amend or terminate the Agreement; however, the actions of the Respondent appear to have been caused by casualness

or looseness in his business practices rather than by bad faith. As a professional, the Respondent should have known better and he should have done better. The Respondent's violations caused the Claimant inconvenience, money, and time. The maximum possible monetary penalty for two violations would be $5,000.00. The REC suggested a total of $5,000.00 for the two violations. I find that $2,500.00 per violation strikes a balance between the harm caused by the violations and the Respondent's lack of bad faith and lack of previous violations.

The Guaranty Fund Claim

Section 17-404 of the Business Occupations Article governs claims brought against the Fund. A claimant may recover compensation from the Fund for an actual loss based on an act or omission by a licensed real estate salesperson that occurs in the provision of real estate brokerage services involving a transaction that relates to real estate located in this State. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (2018). A claim must be based on an act or omission in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or an act or omission that constitutes fraud or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(iii) (2018); COMAR 09.11.03.04A and B

With respect to claims against the Fund, COMAR 09.11.01.14 states as relevant to this case:

> The amount of compensation recoverable by a claimant from the [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.

Under section 17-407(e) of the Business Occupations Article, the Claimant bears the burden of proof to establish his claim for recovery from the Fund. The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.01.02.16C.

There is no dispute that the Property is located in the State and there is no dispute that the Respondent was a licensed real estate broker at the time of the events at issue. The Claimant was selling his former residence and has no business or familial relationship with the Respondent that would disqualify him from recovery. *See* Md. Code Ann., Bus. Occ. & Prof. § 17-404(c). There is no allegation of theft, embezzlement, false pretenses, forgery or fraud, nor is there evidence to support such findings. There has been proof by a preponderance of the evidence of misrepresentation.

The Agreement very specifically dictated that the Property be listed in coming soon status. It contemplated that happening as soon as the tenant vacated the property, which, at the time the Agreement was signed, was expected to occur on the last day of April 2016. If not before, at the very least by the day the tenant actually left, May 31, 2016, the Property should have been listed as coming soon and should have been active on or around June 22, 2016. Approximately three weeks later, on July 12, 2016, the Property was not listed in any status in MLS and it was not ready to be shown. The Respondent had not prepared marketing materials, there was no sign on the Property. The Respondent misrepresented to the Claimant, who was out-of-state waiting anxiously to get this Property sold, that the Property would be promptly marketed. The Respondent did not move in a timely manner to meet the obligations he had assumed under the Agreement.

Nevertheless, based on the evidence in the record, there is no way to make an appropriate award to the Claimant for *actual* losses. In his original August 2016 claim, the Claimant sought a total of $12,147.00 broken down as follows: three mortgage payments he believed he should not have had to make - $6,447.00; "home preparedness and travel" - $3,000.00; "emergency repair funds" - $500.00; and "tenant deposit for trash removal and repairs" - $2,200.00. REC #3.

As for the mortgage payments, the Claimant believed he should not have had to pay for the months of May, June and July 2016. The tenant remained through May 2016 and paid rent for that month, so that would not represent a loss to the Claimant. For June and July, the Claimant offered only an argument that because it sold within one month in August, it would have sold equally quickly in July had it been properly prepared. The argument has a certain appeal on the surface, but is really nothing more than speculation. Even with Keller Williams, the second brokerage the Claimant used to list the Property, it took a full month to sell. Many factors affect home sales and while I understand why the Claimant sees this as part of his losses, there is no evidence that the payments made were an actual loss to the Claimant.

The second category for which the Claimant seeks money from the Fund is "home preparation and travel." It is not clear that travelling from out-of-state to work on your own Property to prepare it for sale is a compensable loss. If the Claimant had not performed the work himself, somebody else would have been paid to do it. Supplies, like cleaning products and paint and paint brushes, were not losses to the Claimant as contemplated by the statutes and regulations governing the Fund. They were necessary to make the Property marketable. The same is true of the wages paid to painters. The Claimant is not entitled to money for these items as they are not losses to him, even though he was unhappy that he had to come to Maryland to make arrangements for them.

Even if these things qualified as compensable losses, the Claimant provided no receipts and only round number estimates. The Claimant advised that he had provided documentation to the REC, but he had nothing to offer at the hearing. The Fund attempted to obtain better estimates or numbers from the Claimant. He repeatedly said he thought his airline tickets were around $300.00, then said maybe they were $326.00. He testified that he stayed at one hotel for two nights and another for one night, but gave only an estimate of over $100 per night without

anything to corroborate his testimony. He estimated cleaning supplies, which again, are not compensable under these facts, as probably being somewhere between $100 and $150. He stated that he rented a car for four days at $56.00 per day. There were no receipts to support this testimony, but, as the Fund stated, even if he had receipts, it is not clear that these are compensable losses.

The Claimant requested $500.00 for emergency repair funds. There was modest testimony on this item and no documentation regarding when the money was paid, how it was to be held or used, or what the understanding was for return or retention. It appears some of it might have been used to replace an appliance, although the item might have been under warranty. The evidence was simply not sufficiently clear to permit an award for this.

Finally, the Claimant sought return of the tenant's security deposit for "trash removal and repairs." The Claimant testified about the trash left in the Property when he arrived from Georgia. He did not have persuasive evidence of a figure for the amount it cost to remove the trash. The Respondent advised that it would have been rolled into the carpeting job and the debris would have been removed when the carpet was installed. As with some of the other items, the Claimant would have had to pay for the trash removal to prepare the Property whether he did it himself or paid somebody else to do it. I fully understand his position that it should have been done earlier, and it should have been done by the Respondent, but even though he is right about that, it does not render the money spent to accomplish the task a compensable loss. The Claimant did not explain what other repairs were needed. There was some "mudding" or spackling that needed to be done, but some or all of it had been done by people hired by the Respondent. The security deposit was not returned to the tenant and was not retained by the Respondent. The full amount was spent on carpet. The Respondent has failed to show how this is a compensable loss to him or why he should be compensated by the Fund for this item.

I appreciate the Claimant's frustration with his interaction with the Respondent, but this is not an ordinary civil case. The Claimant is seeking money from the Fund, which is set up to provide compensation only for certain types of losses. In this case, the Claimant has failed to prove by a preponderance of the evidence that he is entitled to any money from the Fund.

PROPOSED CONCLUSIONS OF LAW

Based on the Findings of Fact and Discussion, I propose that the Commission conclude as a matter of law that:

1. The Respondent engage in conduct that demonstrated incompetency or improper dealings in violation of Business Occupations Article § 17-322(b)(25).

2. The Respondent violated COMAR 09.11.02.02A, the REC's Code of Ethics, by failing to protect and promote the interests of his client or by failing to act with absolute fidelity to the client's interest. A violation of the Code also constitutes a violation of Business Occupations Article§ 17-322(b)(33).

3. A reprimand is an appropriate sanction as well as a monetary penalty of $5,000.00, which represents $2,500.00 for each of the violations. Business Occupations Article § 17-322(c).

4. The Claimant has not established a compensable claim against the Fund under section 17-404 of the Business Occupations Article.

RECOMMENDED ORDER

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

1. That the Respondent be reprimanded;

2. That the Respondent pay a civil penalty in the amount of $5,000.00;

3. The Maryland Real Estate Commission Guaranty Fund deny the Claimant's claim; and

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

January 30, 2019
Date Decision Issued

SIGNATURE ON FILE
Kimberly Farrell
Administrative Law Judge

KF/cmg
Document #177732