THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF SIXUN YANG V.	*	BEFORE ROBERT F. BARRY ADMINISTRATIVE LAW JUDGE,
STATE REAL ESTATE COMMISSION, REAL ESTATE GUARANTY FUND, FOR THE ALLEGED MISCONDUCT OF DACHENG WANG	* * * *	OF THE MARYLAND OFFICE OF ADMINISTRATIVE HEARINGS OAH No: DLR-REC-22-18-05963 REC CASE NO: 2017-RE-408

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

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated August 7, 2018, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 20th day of September,2018,

ORDERED,

A. That the Findings of Fact in the Recommended Decision be, and hereby are, AFFIRMED;

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,

D. That the records, files and documents of the Maryland State Real Estate Commission reflect this decision.

MARYLAND STATE REAL ESTATE COMMISSION

SIGNATURE ON FILE

21 September 2018
Date

By _____
Marla Johnson, Commissioner

IN THE MATTER OF THE CLAIM	*	BEFORE ROBERT F. BARRY,
OF SIXUN YANG,	*	ADMINISTRATIVE LAW JUDGE
CLAIMANT	*	OF THE MARYLAND OFFICE
V.	*	OF ADMINISTRATIVE HEARINGS
STATE REAL ESTATE COMMISSION,	*	OAH No.: DLR-REC-22-18-05963
REAL ESTATE GUARANTY FUND,	*	MREC No.: 17-RE-408
FOR THE ALLEGED MISCONDUCT	*	
OF DACHENG WANG,	*	
RESPONDENT	*	

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

PROPOSED DECISION

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STATEMENT OF THE CASE

On February 23, 2017, Sixun Yang (Claimant) filed a complaint with the State Real Estate Commission (Commission) against Dacheng Wang (Respondent), whom the Commission formerly licensed as a real estate broker, concerning the proposed sales of two properties located in Montgomery County, Maryland. On that same date, the Claimant filed a claim against the Real Estate Guaranty Fund (Guaranty Fund) to recover compensation for an alleged actual loss that occurred during those proposed sales when the Respondent, while providing real estate brokerage services to the Claimant, obtained the Claimant's deposit money by embezzlement.

On January 29, 2018, the Commission, by Michael L. Kasnic, Executive Director, issued an Order for Hearing concerning the Claimant's claim against the Guaranty Fund. On February 1, 2018, the Commission referred this case to the Office of Administrative Hearings (OAH).

On May 25, 2018, I conducted a hearing at the OAH in Kensington, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2010). The Claimant represented himself. The Respondent did not appear. Hope Sachs, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Guaranty Fund.

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); the Department's and the Commission's procedural regulations, Code of Maryland Regulations (COMAR) 09.01.03 and 09.11.03; and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

ISSUES

1. Did the Claimant sustain an actual loss resulting from an act that occurred in the provision of real estate brokerage services by the Respondent, then a licensed real estate broker, which involved a transaction relating to real estate located in the State, and in which the Respondent obtained the Claimant's deposit money by embezzlement?

2. If so, what compensation is the Claimant due from the Guaranty Fund?

SUMMARY OF THE EVIDENCE

Exhibits

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

CLAIM #1 - Check made payable by the Claimant to PM Management (Escrow Account), November 3, 2016

Receipt for deposit of the check into account number ending in 3274

Release Agreement between the Claimant as buyer and Christopher Watson as seller for disbursement of earnest money deposit of $4,000.00, January 17, 2017

CLAIM #2 - Check made payable by the Claimant to PM Management (Escrow Account), January 23, 2017

Receipt for deposit of the check into account number ending in 5711

Release Agreement between the Claimant as buyer and Siti Rokhayati as seller for disbursement of earnest money deposit of $3,000.00, February 3, 2017

CLAIM #3 - Text Messages between the Claimant and the Respondent, January 30, 2017 through February 27, 2017

CLAIM #4 - Sales Contract between the Claimant and Christopher Watson, October 28, 2016

CLAIM #5 - Sales Contract between the Claimant and Siti Rokhayati, January 21, 2017

The Respondent did not appear; therefore, he did not submit any documents into evidence.

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

FUND #1 - Notice of Hearing for May 25, 2018

FUND #2 - Order for Hearing, January 29, 2017

FUND #3 - Information concerning the Respondent's real estate broker's license

FUND #4 - Claimant's complaint against the Respondent, with attached letter, February 23, 2017

Testimony

The Claimant testified on his own behalf.

The Respondent did not appear; therefore, he did not present any testimony.

The Guaranty Fund did not present any testimony.

PROPOSED FINDINGS OF FACT

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

1. The Commission licensed the Respondent as a real estate broker under registration number 01-654363 from February 3, 2015 through February 3, 2017, when the Respondent's license expired.

2. The Respondent operated under the trade names PM Management LLC or PMMG LLC.

3. The Claimant, who is licensed by the Commission as a real estate salesperson, was affiliated with the Respondent's real estate brokerage.

4. On October 28, 2016, the Claimant entered into a sales contract with Christopher Watson to purchase real property located on Welbeck Way in Montgomery Village as an investment. The Claimant acted as his own real estate salesperson; the Respondent acted as the Claimant's real estate broker.

5. The sales contract required the Claimant to make a deposit of $4,000.00 and the Respondent, as escrow agent, to hold the deposit in escrow until it was credited toward the sales price at settlement, or "all parties have agreed in writing as to its disposition." (CLAIM #4).

6. On November 3, 2016, the Claimant deposited $4,000.00 into the Respondent's escrow account.

7. The sale of the Welbeck Way property was a short sale, contingent upon the secured party's approval of the sale price. The secured party did not approve the sale price.

8. On January 19, 2017, the Claimant and Mr. Watson executed a Release Agreement, directing the Respondent to disburse the deposit to the Claimant.

9. On January 21, 2017, the Claimant entered into a sales contract with Siti Rokhayati to purchase real property located on Pilgrims Cove in Rockville (or Derwood) as an investment. The Respondent acted as the Claimant's real estate salesperson and real estate broker.

10. The sales contract required the Claimant to make a deposit of $3,000.00 and the Respondent, as escrow agent, to hold the deposit in escrow until it was credited toward the sales price at settlement, or "all parties have agreed in writing as to its disposition." (CLAIM #5).

11. On January 24, 2017, the Claimant deposited $3,000.00 into the Respondent's savings account, which the Respondent was to deposit into his escrow account.

12. The sale of the Pilgrims Cove property was a short sale, contingent upon the secured party's approval of the sale price. The secured party did not approve the sale price and the Pilgrims Cove property was sold at auction sometime before February 4, 2017.

13. On February 3, 2017, the Claimant and Ms. Rokhayati executed a Release Agreement, directing the Respondent to disburse the deposit to the Claimant.

14. On January 30, 2017, the Claimant texted the Respondent, requesting the $4,000.00 deposit for the Welbeck Way property. The Respondent replied that he was out of town and promised to pay the Claimant on the following Tuesday (February 7, 2017).

15. On February 4, 2017, the Claimant texted the Respondent, requesting both the $4,000.00 deposit for the Welbeck Way property and the $3,000.00 deposit for the Pilgrims Cove property. The Respondent replied that he was in Toronto, would be back on Monday, and the Claimant would "get all money." (CLAIM #3).

16. On February 8, 2017, the Claimant texted the Respondent, requesting that the Respondent send him a check for the return of the deposit money. The Respondent replied that he was under a tax audit and would have to pay the Claimant in cash.

17. Later that day, the Respondent promised to pay the Claimant on Monday (February 13, 2017). The Claimant replied that he felt "something is wrong" and demanded payment by February 15, 2017. The Respondent assured the Claimant that there was "[n]othing wrong." (CLAIM #3).

18. On February 13, 2017, at 10:25 p.m., the Claimant texted the Respondent, commenting that he had not seen a deposit into his account by the Respondent. The next day, the Respondent replied, promising to pay the Claimant in two days. The Claimant replied, demanding

payment by February 17, 2017.

19. When he had not received the deposit money by February 17, 2107, the Claimant again texted the Respondent, who stated that he was closing out accounts worth $80,000.00, and he would get back to the Claimant.

20. On February 23, 2017, the Claimant filed his complaint with the Commission against the Respondent and his claim against the Guaranty Fund to recover compensation for the Respondent's conduct.

21. On February 23, 2017, the Claimant texted the Respondent, informing him about the complaint and the claim against the Guaranty Fund, and offering to withdraw the complaint and the claim if the Respondent would return the deposit money. The Respondent replied that he was sick.

22. On February 27, 2017, the Respondent texted the Claimant, indicating that his "accounts are still frozen," offering the Claimant a small amount of Chinese currency, and saying that he would borrow from relatives. (CLAIM #3).

23. On March 9, 2017, the Claimant texted the Respondent, indicating that he had not received any of his deposit money, and the Commission was processing his complaint.

24. As of the date of the hearing, the Respondent had not paid the Claimant any of the deposit money.

25. The Respondent converted the Claimant's deposit money, which the Respondent was required to hold in trust in an escrow account for the Claimant's benefit, to his own use.

26. On March 19, 2018, the OAH scheduled the hearing in this matter for Friday, May 25, 2018, at the OAH in Kensington, and sent a notice of hearing to the Respondent by first-class and certified mail at his last address of record with the Commission.

27. The United States Postal Service (USPS) did not return either mailing to the OAH; nor did the USPS return to the OAH the receipt for delivery of the certified mailing.

DISCUSSION

The Respondent's Failure to Appear

As noted above, on March 19, 2018, the OAH sent a notice for the hearing scheduled on May 25, 2018 at the OAH in Kensington to the Respondent by first-class and certified mail at his last address of record with the Commission. The Commission's records listed that address as both the Respondent's home and business address. The USPS did not return either mailing to the OAH; nor did the USPS return to the OAH the receipt for delivery of the certified mailing.

Section 17-408 of the Business Occupations and Professions Article provides:

> (a) The Commission shall give the claimant and the licensee . . . alleged to be responsible for the act or omission giving rise to the claim an opportunity to participate in the hearing before the Commission.
>
> (b) The Commission shall give notice of the hearing to:
>
> (1) the claimant;
>
> (2) each licensee alleged to be responsible for the act or omission giving rise to the claim;
>
> . . . .
>
> (c) The Commission may not proceed with the hearing unless the records of the Commission records show that all notices required under this subtitle [subtitle four] were sent to each licensee . . . alleged to be responsible for the act or omission giving rise to the claim.

Section 17-408 does not provide the method by which the Commission is to give notice to a licensee alleged to be responsible for the act or omission giving rise to a claim against the Guaranty Fund. The only section of subtitle four that contains a method for providing notice is section 17-407, concerning a claim against the Guaranty Fund that does not exceed $5,000.00. Pursuant to that statute, the Commission, without conducting a hearing, may issue a proposed

order granting such a claim. The Commission shall send its proposed order to the licensee by personal delivery, or by both regular and certified mail, return receipt requested, "at the most recent address on record with the Commission." Md. Code Ann., Bus. Occ. & Prof. § 17-407(d)(1) (Supp. 2017). Similarly, section 17-324 of the Business Occupations and Professions Article, concerning disciplinary proceedings against a real estate licensee, provides that a hearing notice must be served personally on a licensee or sent by certified mail to the last known address of the licensee. *Id.* § 17-324(d)(1) (2010). If the licensee, after receiving proper notice of the disciplinary hearing, fails or refuses to appear, the Commission may hear and determine the matter despite the individual's absence. *Id.* § 17-324(f).

Sections 17-407(d)(1) and 17-324(d)(1) indicate that the legislature considers notice sent by regular mail to the last known address of the licensee to be adequate in the context of the Commission's proposed orders for certain claims against the Guaranty Fund and by certified mail to the last known address of the licensee for disciplinary hearings. I find it appropriate to use these standards in determining whether the Respondent received adequate notice of the hearing. As noted above, the OAH sent the Respondent's notice to his last address of record with the Commission. Therefore, I conclude that the Commission, by the OAH, sent proper notice of the hearing by regular and certified mail to the Respondent, but he nevertheless failed to appear. It was appropriate under the circumstances to proceed with the hearing despite the Respondent's failure to appear.

Analysis

Section 17-404(a) of the Business Occupations and Professions Article provides the criteria for a person to recover compensation from the Guaranty Fund:

> (a) (1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.

(2) A claim shall:

(i) be based on an act or omission that occurs in the provision of real estate brokerage services by:

1. a licensed real estate broker;

2. a licensed associate real estate broker;

3. a licensed real estate salesperson;

4. an unlicensed employee of a licensed real estate broker;

(ii) involve a transaction that relates to real estate that is located in the State; and

(iii) be based on an act or omission;

1. in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or

2. that constitutes fraud or misrepresentation.

The amount recovered for any claim against the Guaranty Fund "shall be restricted to the actual monetary loss incurred by the claimant, but may not include monetary losses other than the monetary loss from the originating transaction." COMAR 09.11.01.14. The Claimant bears the burden of proving his entitlement to recover compensation from the Guarantee Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (Supp. 2017). As explained below, the Claimant clearly met his burden of proof that he is entitled to recover compensation from the Guaranty Fund.

Did the Claimant sustain an actual loss resulting from an act by the Respondent, then a licensed real estate broker, which occurred in the provision of real estate brokerage services, involved a transaction relating to real estate located in the State, and by which the Respondent obtained the Claimant's deposit money by embezzlement?

As detailed in the findings of fact, the Respondent provided real estate brokerage services, once as a real estate broker and once as a real estate broker and real estate salesperson, to the Claimant in relation to two attempted short sales of real estate in Montgomery County, Maryland.

See Md. Code Ann., Bus. Occ. & Prof. § 17-101(l)(1)(i) (2010) (the provision of real estate brokerage services means, in pertinent part, to provide for consideration services for another person concerning the buying of any real estate). These facts satisfy the first three criteria for the Claimant's reimbursement from the Guaranty Fund – the licensed real estate broker requirement, the providing real estate brokerage services requirement, and the concerning the sale of real estate in this State requirement.

Also as detailed in the findings of fact, the Respondent obtained the Claimant's money by embezzlement. Section 7-113(a) of the Criminal Law Article, titled, "Embezzlement – Fraudulent misappropriation by fiduciary," provides:

> (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.

A real estate broker stands in a fiduciary relationship to his client. *Wilkins Square, LLLP v. W.C. Pinkard & Co., Inc.*, 189 Md. App. 256, 267 (2009), *aff'd* 419 Md. 173 (2011). A fiduciary is "[s]omeone who is required to act for the benefit of another person on all matters within the scope of their relationship." Black's Law Dictionary (10th ed 2014). A real estate broker's specific fiduciary duties in regards to a client's deposit are set forth by statute. A deposit is a one type of "trust money," which "means a deposit, payment, or other money that a person entrusts to a real estate broker . . . to hold for: (1) the benefit of the owner . . . of the trust money; and (2) a purpose that relates to a real estate transaction involving real estate in the State." Md. Code Ann., Bus. Occ. & Prof. § 17-501(c) (2010). Sections 17-502(b) and 17-505(a) of the

Business Occupations and Professions Article explain what the real estate broker must do with trust money:

> (b)(1) [A] real estate broker promptly, but not more than 7 business days after the acceptance of a contract of sale by both parties, shall deposit trust money in an account that is maintained by the real estate broker:
>
> (i) separately from the real estate broker's own accounts; and
>
> (ii) solely for trust money.
>
> (2) A real estate broker may not use trust money for any purpose other than that for which it is entrusted to the real estate broker.

Section 17-505(a) provides, in pertinent part:

> (a) A real estate broker shall maintain trust money in an account authorized [by statute] until:
>
> (1) the real estate transaction for which the trust money was entrusted is consummated or terminated;
>
> (2) the real estate broker receives proper written instructions from the owner . . . directing . . . disposition of the trust money. . . .

During each attempted short sale, the Respondent, in his fiduciary capacity, received deposit money, $4,000.00 in one transaction and $3,000.00 in the other transaction, from the Claimant that the Respondent was contractually obligated to hold in escrow until the deposit money was credited toward the sales price at settlement, or "all parties have agreed in writing as to its disposition." (CLAIM #4, #5). Both attempted short sales were unsuccessful and each of the sellers executed a Release Agreement, directing the Respondent to disburse the deposit money to the Claimant. The Respondent was required by statute and by the terms of the sales contracts to disburse the deposit money to the Claimant. The Respondent failed to disburse the deposit money to the Claimant, and the Respondent's conduct and communications with the Claimant indicate that the Respondent converted the Claimant's deposit money to his own use.

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Between January 30, 2017 and March 9, 2017, the Claimant, in a series of text messages with the Respondent, demanded the return of the deposit money. The Respondent provided several excuses for not returning the deposit money to the Respondent – he was out of town, he was sick, he was under audit and his accounts were frozen – none of which ring true. Whatever intentions the Respondent had for the deposit money when he first received it, it is clear that as of late January 2017 or early February 2017, the Respondent had converted the deposit money to his own use and was guilty of embezzlement. *State v. Burroughs*, 333 Md. 614 (1994); *see generally* 9 M.L.E. *Embezzlement* §§ 2 & 3, pp. 251-52 (2008) (the offense of embezzlement is complete whenever a person who has been entrusted with money or property forms an intent to convert it to his or her own use, and has possession with such intent).

PROPOSED CONCLUSIONS OF LAW

Based on the proposed findings of facts and discussion, I conclude that the Claimant sustained an actual loss resulting from an act by the Respondent, then a licensed real estate broker, which occurred in the provision of real estate brokerage services, involved a transaction relating to real estate located in the State, and by which the Respondent obtained the Claimant's deposit money of $7,000.00 by embezzlement. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(1), (2) (Supp. 2017). I further conclude that the Claimant is entitled to $7,000.00 in reimbursement from the Guaranty Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(1)(iii) (Supp. 2017); COMAR 09.11.01.14.

PROPOSED ORDER

I PROPOSE that the Real Estate Guaranty Fund grant Sixun Yang's claim for reimbursement in the amount of $7,000.00.

SIGNATURE ON FILE

August 7, 2018
Date Decision Issued

Robert F. Barry
Administrative Law Judge

RFB/emcl
#174852