

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**IN THE MATTER OF THE CLAIM
OF DAVID AND LILLIAN HICKS,
CLAIMANT**

v.

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

CASE NO. 2019-RE-354

OAH NO. DLR-REC-22-19-06914

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated July 17, 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 Claimant, **David and Lillian Hicks**, be

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

- On pages 2-3 of the recommended decision the ALJ identifies exhibits including:
 - GF Ex. 3, Respondent's licensing history, which is dated April 3, 2019, not March 14, 2019; and
 - Resp. Ex. 1, letter from Respondent's brother and sister-in-law, which is dated April 25, 2019, not April 22, 2019.

reimbursed from the Maryland Real Estate Guaranty Fund in the amount of **Two Thousand Eight Hundred Thirty Eight Dollars (\$2,838.00)**;

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 minor typographical errors.

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.

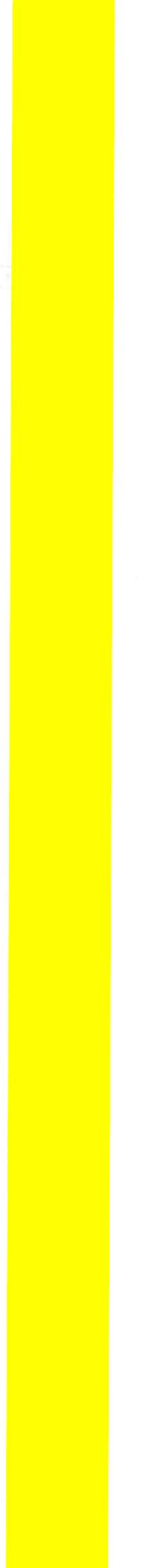
G. Once the Proposed Order becomes final, the parties have an additional thirty (30) days in which to file an appeal to the Circuit Court for the Maryland County in which the Appellant resides or has his/her principal place of business, or in the Circuit Court for Baltimore City.

MARYLAND REAL ESTATE COMMISSION

8/21/19
Date

By: SIGNATURE ON FILE

SIGNATURE ON FILE



IN THE MATTER OF THE CLAIM
OF DAVID & LILLIAN HICKS,
CLAIMANTS

v.

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

* BEFORE LORRAINE E. FRASER,
* ADMINISTRATIVE LAW JUDGE,
* THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH CASE No. DLR-REC-22-19-06914
* REC COMPLAINT No. 19-RE-354.

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On January 30, 2019, David and Lillian Hicks (Claimants) filed a claim against the Maryland Real Estate Commission (REC) Guaranty Fund (Fund) for \$5,748.00¹ for monetary losses allegedly incurred by the Claimants as a result of the misconduct of David Herbst (Respondent), a licensed real estate broker, in providing property management services to the Claimants for real property located at 3701 Coastal Highway, Unit 105A, and 331 Robin Drive, Unit 204, both located in Ocean City, Maryland (collectively the Properties).

¹ The Claimants modified this amount during the hearing, as discussed below.

On March 6, 2019, the REC issued an Order for Hearing. Also, on March 6, 2019, the REC transmitted the matter to the Office of Administrative Hearings (OAH) for a hearing on the Claimants' claim against the Fund.

On April 25, 2019, I conducted a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2018). The Claimants represented themselves. The Respondent represented himself. Jessica Kauffman, 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 Claimants 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 Notice of Hearing, 3/6/19
- GF Ex. 2 Transmittal; Hearing Order, 3/6/19; Complaint, 1/30/19
- GF Ex. 3 The Respondent's licensing history, 3/14/19
- GF Ex. 4 Complaint, 1/30/19; email from the Claimants to the REC, 1/7/19; email from the Claimants to Bud Church Realty, 12/21/18; letter from the Respondent's brother, 9/7/18; notice from the Claimants' bank that a check was returned for insufficient funds, 8/24/18; check from the Respondent to the Claimants for \$570.00, 8/1/18; notice from the Claimants' bank that a check was returned for insufficient funds, 9/6/18

The Claimants did not offer any exhibits for admission into evidence.

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

Claimant Lillian 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 Claimants are the owners of the Properties, two condominium units located in Ocean City, Maryland. One unit has two bedrooms, the other unit has one bedroom.
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. Every year since at least 2016, the Claimants and the Respondent entered into a rental agreement for the Respondent to act as the exclusive rental agent for the Claimants.

4. Under the agreement, the Respondent collected rental payments and deposits from tenants on behalf of the Claimants. The Claimants paid the Respondent 12% of the gross rental for weekly and annual rentals the Respondent obtained.

5. The Respondent obtained a tenant who rented the one-bedroom unit from January 1, 2018 through December 31, 2018. The rent for the one-bedroom unit was \$750.00 per month. The tenant also paid a \$750.00 security deposit.

6. In the end of June 2018, the tenant of the one-bedroom unit notified the Respondent's office that he was moving to Canada. A member of the Respondent's staff notified the Claimants. The Claimants did not agree to let the tenant break the lease.

7. The Claimants received the rental payments for the one-bedroom unit less the Respondent's 12% commission for each month January 2018 through June 2018.

8. The Claimants did not receive any rental payments for the one-bedroom unit starting in July 2018.

9. The Claimants were owed the tenant's \$750.00 security deposit as compensation for the tenant of the one-bedroom unit failing to pay rent for the remainder of the lease term.

10. The Respondent obtained tenants and collected rent for the two-bedroom unit for the second and fourth weeks in July 2018 on behalf of the Claimants. The Claimants charged \$1,400.00 per week in rent for the two-bedroom unit. The weekly tenants also paid a \$100.00 security deposit.

11. A tenant of the two-bedroom unit broke the television set in the unit. The television cost more than \$100.00. The Claimants notified the Respondent's office that the

television was broken and a member of the Respondent's staff told the Claimants they would receive the \$100.00 security deposit. The Claimants did not receive the \$100.00 security deposit.

12. After subtracting the Respondent's 12% commissions, the Claimants should have received \$2,464.00 for the rental of the two-bedroom unit ($\$1,400.00 \times 2 = \$2,800.00 \times .88 = \$2,464.00$). In addition, the Claimants should have received the \$100.00 security deposit.

13. The Respondent remitted \$500.00 to the Claimants for the two-bedroom unit rentals.

14. The Respondent owes the Claimants \$750.00 for the one-bedroom unit security deposit and \$2,064.00 for the two bedroom unit rentals and security deposit, for a total of \$2,814.00 ($\$750.00 + \$2,064.00 = \$2,814.00$).

15. The Respondent sent the Claimants a check in August 2018, which was returned by the Claimants' bank for insufficient funds. A staff member at the Respondent's office told the Claimants to resubmit the check, which they did. The check was returned again for insufficient funds. The Claimants' bank charged a total of \$24.00 for the returned check.

16. The Respondent owes the Claimants a total of \$2,838.00 ($\$2,814.00 + \$24.00 = \$2,838.00$).

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.

Claimant Lillian in this case testified and submitted documents showing that the Properties were rented through the Respondent. At the hearing, the Claimants amended their claim to \$6,324.00. The one-bedroom unit was rented from January 1, 2018 through December 31, 2018. However, the tenant moved out at the end of June and did not make any rent payments for July 2018 or the rest of the lease term. The Claimants should have received the \$750.00 security deposit as compensation. The Claimants argued that the Respondent owed them the monthly rental payments for July through December 2018; however, there is no evidence the Respondent received these payments from the tenant. Thus, I cannot find the Respondent failed to pay those amounts to the Claimants.

The two-bedroom unit was rented for two weeks in July 2018. A tenant of the two-bedroom unit broke the television. The Claimants should have received the \$100.00 security deposit as compensation for the broken television, as well as the payments for the two weeks the unit was rented. The Claimants submitted evidence showing the total amount they were owed for the rentals and the partial payments they received from the Respondent. In addition, the

Claimants submitted the notice from their bank showing the check from the Respondent that was returned for insufficient funds twice. The evidence shows the Respondent owes the Claimants \$2,838.00 for both units.

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 Claimants. Further, the Respondent has not paid the Claimants the money he owes them as of the date of the hearing.

The Fund argued that the Respondent agreed to collect money on behalf of the Claimants and disburse those funds to the Claimants but that he failed to do so. The Fund maintained that the Respondent's failure to disburse all the collected funds to the Claimants constituted a misrepresentation. The Fund recommended an award to the Claimants of \$2,814.00.²

Therefore, I find the Claimants are entitled to an award from the Fund in the amount of \$2,838.00 for their 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 Claimants 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 Claimants but not remitted in full to the Claimants, 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 Claimants are entitled to receive an award from the Fund in the amount of \$2,838.00. *Id.*; COMAR 09.11.01.14.

² The Fund suggested the \$24.00 returned check fees not be included in the award. I disagree because the returned check fees are directly related to the Respondent's failure to pay the Claimants the rental money he collected. The Respondent failed to maintain the Claimants' funds in his account; these were funds he held in trust for them.

RECOMMENDED ORDER

I PROPOSE that the claim filed by the Claimants against the Maryland Real Estate Guaranty Fund be GRANTED in the amount of \$2,838.00.

SIGNATURE ON FILE

July 17, 2019
Date Decision Issued

Lorraine E. Fraser
Administrative Law Judge

LEF/kdp
181048

SIGNATURE ON FILE

10-17-2010
The Office of...

Name
Title

