

THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM \* BEFORE MICHAEL D. CARLIS,  
OF LESLEY DALE ZARK AND \* ADMINISTRATIVE LAW JUDGE  
RAINER UWE JETTMAR \* OF THE MARYLAND OFFICE OF  
AGAINST THE MARYLAND REAL \* ADMINISTRATIVE HEARINGS  
ESTATE COMMISSION GUARANTY \*  
FUND FOR THE ALLEGED \* OAH No: DLR-REC-22-15-33269  
MISCONDUCT OF MICHELE \* REC CASE NO: 15-RE-426 GF  
PHILLIPS- ALLEY

\* \* \* \* \*

**PROPOSED ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated February 23, 2016, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 16<sup>th</sup> day of March, 2016;

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**

3/16/16  
Date

By: \_\_\_\_\_  
Anne S. Cooke, Commissioner

IN THE MATTER OF THE CLAIM OF  
LESLEY DALE ZARK AND RAINER  
UWE JETTMAR,  
CLAIMANTS,

v.

THE MARYLAND REAL ESTATE  
COMMISSION GUARANTY FUND  
FOR THE ALLEGED MISCONDUCT OF  
MICHELE PHILLIPS-ALLEY, A  
LICENSED REAL ESTATE  
SALESPERSON,  
RESPONDENT

\* BEFORE MICHAEL D. CARLIS,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
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\* OAH CASE No.: DLR-REC-22-15-33269  
\* MREC COMPLAINT No.: 15-RE-426GF

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**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 or about March 20, 2015, Lesley Dale Zark and Rainer Uwe Jettmar (Claimants) filed a complaint with the Maryland Real Estate Commission (Commission)<sup>1</sup> in which they claimed

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<sup>1</sup> The Commission is part of the Department of Labor, Licensing, and Regulation (Department). Md. Code Ann., Bus. Occ. & Prof. § 17-201 (2010).

compensation from the Guaranty Fund. The Claimants sought \$20,676.50<sup>2</sup> for an actual loss allegedly caused by the misconduct of Michele D. Phillips-Alley (Respondent), a licensed real estate salesperson<sup>3</sup> who was acting as a property manager through Schwartz Realty, Inc. (Schwartz).

On September 18, 2015, the Commission ordered a hearing on the claim. On September 23, 2015, the Commission transmitted the case to the Office of Administrative Hearings (OAH) for a hearing.

On December 2, 2015, I convened a hearing in Largo, Maryland. The Claimants were present; Ms. Zark presented the Claimants' case. The Respondent did not appear.<sup>4</sup> Jessica Berman Kaufman, Assistant Attorney General, and the Office of the Attorney General, represented the Fund.

The Administrative Procedure Act, the Department's procedural regulations, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 09.01.02, 09.01.03, and 09.11.03; COMAR 28.02.01.

### ISSUES

The issues are:

A. 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,

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<sup>2</sup> This amount was amended at the hearing to \$21,366.30.

<sup>3</sup> A "licensed real estate salesperson" is, "unless the context requires otherwise, a real estate salesperson who is licensed by the Commission to provide real estate brokerage services on behalf of a licensed real estate broker with whom the real estate salesperson is affiliated." Md. Code Ann., Bus. Occ. & Prof. § 17-101(j) (2010). "Provide real estate brokerage services" means, among other things, "collecting rent for the use of any real estate." *Id.* § 17-101(l)(1)(ii).

<sup>4</sup> The case file and Fund 1A-C establish that the Respondent received proper notice of the hearing. *See* Md. Code Ann., State Gov't § 10-208 (2014); Code of Maryland Regulations (COMAR) 28.02.01.05; COMAR 09.01.02.05; *Golden Sands Club Condo. v. Waller*, 313 Md. 484, 496-98 (1988).

B. What amount of compensation from the Guaranty Fund, if any, should the Claimants receive?

**SUMMARY OF THE EVIDENCE**

**Exhibits**

The following exhibits were admitted for the Commission:

Fund 1A: Two Notices of Hearing, dated October 13, 2015, with attachments;

Fund 1B: Notice of Hearing, dated October 20, 2015;

Fund 1C: Two Notices of Hearing, dated November 13, 2015, with attachments;

Fund 2: Respondent's Driver's Record Information;

Fund 3: Respondent's licensing record;

Fund 4: Transmittal and Order for Hearing, dated September 18, 2015; and

Fund 5: Commission – Online Complaint Form.

The following exhibits were admitted for the Claimants:

Claimants 1: History of Setting Up Automated Payment (ACH) for Rental Deposits From Schwartz Realty to Lesley Stark and Rental Payments (2013);

Claimants 2: Letter from T. Sutherland to G. Heine, dated December 22, 2013; ACH Transfers from Schwartz Account to M&M Services Account; ACH Debits/Withdrawals from Schwartz Account to M&M Services Sprint Account; Disbursements to E. Alley, Jr.; Disbursements to Barry Toney; Disbursements to K. Klein; Cheryl Morgal Transactions; Home Depot Transactions; Deposits Analysis; Receipt for James Herrod; Yellow Copy of Deposit Slip for 834 Shady Oaks Road (Cummings);

Claimants 3: Defendant Trial Summary;

Claimants 4.1: Payment Receipts from the Records of Schwartz Realty from the Renters;

Claimants 4.2: Record of Payments Schwartz Realty Indicates Were Paid to Lesley Zark (2013);

Claimants 5: Summary Chart by Month for 2013: the Amount Received by Schwartz, the Net Amount of Commissions and expenses due Schwartz that Lesley Zark Received, the Actual Amount Lesley Zark Received, the Amount Owed for the Properties at 8133 Woodland Lane, Chesapeake, Maryland [and] 1442 Cedarhurst Road, Shadyside, Maryland; and

Claimants 6: Bank Statements from the OAS Credit Union Account of Lesley Zark Reflecting Monies Received from Schwartz Realty on Rental Properties for 2013.

Testimony

Ms. Zark and Cora Judy O'Neill, Property Manager at Schwartz, testified for the Claimants.<sup>5</sup>

The Guaranty Fund offered no witnesses.

**FINDINGS OF FACT**

I find the following by a preponderance of the evidence:

1. At all times relevant to this decision, the Commission licensed the Respondent as a Real Estate Salesperson under registration number 531252. Schwartz employed the Respondent as a property manager.
2. At least since January 2013, the Claimants have owned rental properties at 8133 Woodland Lane, Chesapeake Beach, Maryland (the Woodland Property) and 1442 Cedarhurst Road, Shadyside, Maryland (the Cedarhurst Property) (collectively, the Properties).
3. From at least January 2013 through December 2013, the Claimants and Schwartz were parties to a property management agreement (Agreement). Schwartz agreed to manage the Properties for a fee, collect rents from the tenants, and remit the rents, minus fees and expenses, to the Claimants.
4. The amount of the monthly rent for the Woodland Property was \$1,650.00 of which \$1,584.00 was to be remitted to the Claimants. The amount of the monthly rent for the Cedarhurst Property was \$1,550.00 of which \$1,488.00 was to be remitted to the Claimants.
5. Schwartz assigned the Respondent to manage the properties.

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<sup>5</sup> Richard L. Miller, Esquire, and Monshower, Miller & Magrogan, LLP, represented Ms. O'Neill and Schwartz.

6. The Respondent did not remit payments to the Claimants according to the Agreement beginning in January 2013.
7. Ms. Zark repeatedly contacted the Respondent to inquire about not having received payments. The Respondent gave false and misleading explanations about such failure related to, among other things, the tenants' failure to pay, Schwartz's initiation of judicial process to collect rents, and Schwartz's attempt to locate the tenants' assets to collect on judgments.
8. In October 2013, Ms. Zark contacted Schwartz to complain about the Respondent's execution of the Agreement.
9. After criminal charges for theft were brought against the Respondent, Schwartz engaged a forensic accountant to review the Respondent's performance as a property manager of the Properties, and other properties. The forensic accountant completed an audit of the Respondent's activities during the period October 1, 2011, through October 16, 2013. She concluded that "[t]he total possible theft of Schwartz assets [by the Respondent] . . . is \$108,248.14."
10. On March 14, 2014, the Respondent pled guilty to one count of theft between \$10,000.00 to under \$100,000.00 in the District Court of Anne Arundel County.
11. As a result of the Respondent's theft of rents collected for the Properties from January 2013 through September 2013, and the Respondent's misrepresentation to Ms. Zark regarding the reasons for the non-remittance of rental fees to the Claimants, the Claimants did not receive \$21,366.30 in rental payments to which they were entitled under the Agreement.

## DISCUSSION

### *Review of the Relevant Law*

The burden of proof is on the “claimant to establish the validity of the claim.” Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (Supp. 2015).<sup>6</sup> The burden is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217 (2014); COMAR 09.01.02.16C.

Section 17-404 governs claims against the Guaranty Fund and provides as follows:

#### **§ 17-404. Claims against Guaranty Fund.**

(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) *Limitation on recovery.* — The amount recovered for any claim against the Guaranty Fund may not exceed \$50,000 for each claim.

*See also* COMAR 09.11.03.04 (using “misconduct” interchangeably with “act or omission” as used in section 17-404(a)(2)(i) above).

COMAR 09.11.01.18 provides:

The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund, pursuant to Business Occupations and Professions Article, Title 17, Subtitle 4, Real Estate Guaranty Fund, Annotated Code of Maryland, 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 his

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<sup>6</sup> All subsequent citations to the Business Occupations and Professions Article shall be to sections only.

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.

### Summary of the Evidence

Ms. Zark testified that she and Mr. Jettmar, her husband, own the Properties. Ms. Zark also testified that "at least" since March 2012, she and her husband have contracted with Schwartz to manage the Properties, including collecting rent from tenants residing in the Properties and remitting the rents to them, minus fees.

Ms. Zark testified that from January through October 2013, Schwartz assigned the Respondent to manage the Properties. She also testified that the rent for the Woodland Property during that period was \$1,650.00 per month of which Schwartz was entitled to retain \$66.00 for its services and expenses, and the Claimants were due \$1,584.00 per month. Ms. Zark also testified that from January through October 2013, the rent for the Cedarhurst Property was \$1,550.00 per month of which Schwartz was entitled to retain \$62.00 for its services and expenses, and the Claimants were due \$1,488.00 per month.

Ms. Zark testified that Schwartz did not remit to the Claimants the total amounts due from the collection of rent for the Properties from January through October 2013 due to the Respondent's theft and embezzlement of most of the collected rental payments. Ms. Zark also testified that during "most" of 2013, she repeatedly talked to the Respondent about not receiving full rental remittances for the Properties, and the Respondent claimed "at various time" that the renters had fallen behind on the rent; Schwartz was instituting court action to collect the rent; or Schwartz was pursuing the tenants' assets to satisfy judgments against the tenants for failure to pay rent. Ms. Zark testified that she later learned these explanations were false.

Ms. Zark testified that she "brought the rental payment" issue to Schwartz's attention in October 2013, and as a result, Schwartz hired a forensic accountant to investigate the



Respondent's handling of rental agreements on behalf of Schwartz. Ms. Zark identified Claimants 2 as the forensic accountant's final report of her investigation.

According to Claimants 2, the accountant "provided forensic accounting services to [Schwartz] in response to a possible theft of assets owned by [Schwartz]" during the period October 2011 through October 16, 2013. The forensic accountant concluded that "the total possible theft [by the Respondent] for Schwartz assets . . . is \$108,248.14." The report does not specifically discuss the Claimants.

Ms. Zark testified that the Respondent pled guilty to one count criminal theft. Claimant 3 is a trial summary from the District Court for Anne Arundel County (District). It shows that on March 14, 2014, the Respondent pled guilty to one count of theft between \$10,000.00 to under \$100,000.00 for which she was sentenced to incarceration for seven years, with all but one year and six months suspended, and ordered to pay restitution in the amount of \$61,066.21 to Schwartz and \$37,760.00 to Travelers Casualty Insurance Company.

Ms. Zark testified that she and Mr. Jettmar met with Schwartz, including Mr. Heine, apparently the owner of Schwartz, and Ms. O'Neill, to determine the amount of rent the Respondent had collected from the Properties and the amount of the collected rent that had not been remitted to the Claimants. Ms. Zark testified Schwartz agreed, at that time, that the Claimants had not received the amount of remitted rent under the Agreement to which the Claimants were entitled.

Ms. Zark testified that the total amount she and Mr. Jettmar were entitled to receive, but had not, from Schwartz for the rent for the Properties from January through October 2013, was \$21,366.30. Ms. Zark explained that the reason this amount is slightly more than what was alleged in the complaint (\$20,676.50) was her discovery, after she filed the complaint, that she

did not include an entry for the amount of the difference in the spread sheet that she used to calculate her actual loss.

Ms. Zark also testified that Claimants 6 documents the amounts Schwartz still owes to the Claimants for rents the Respondent collected on the Properties from January through October 2013 but did not remit to the Claimants. Claimants 6 graphs the amounts owed per month for the properties, with the total amount for the Woodland Property at \$10,784.30 and the total amount for the Cedarhurst Property at \$10,582.00, for a combined total of \$21,366.30. Attached to the graph is documentation that supports the figures, including statements from the Claimants' bank and checks from Schwartz.

Ms. O'Neill testified that she began employment as a property manager with Schwartz in October 2013, at which time she assumed the management of the Properties. The Claimants agree that from October — after Ms. O'Neill assumed management duties for the Properties — through December 2013, Schwartz remitted the full amount of rental payments according to the Agreement.

Ms. O'Neill testified that she was “not primarily” involved in the forensic accounting, but:

the forensic accountant came up with the amount that they used in court and after we got the evidence box back from the State's Attorney and police department and everybody else, I started plowing through it to find out how much was really owed to Ms. Zark and to check out what receipts or any other documentation that I could locate.

Based on her review, Ms. O'Neill testified that she agreed with Ms. Zark's testimony that the Respondent had stolen rent money collected for the Properties and had not remitted \$21,366.30 of that money to the Claimants that they should have received under the Agreement from January through September 2013. Ms. O'Neill also testified that the Respondent has not returned “one cent” of the money she stole to Schwartz.

## Analysis

As discussed above, the Respondent did not contest the claim. Therefore, Ms. Zark's testimony and supportive exhibits were not refuted. Moreover, Claimants 3 establishes that the Respondent was convicted of theft in the District Court based at least in part on theft of funds due the Claimants. In addition, Ms. O'Neill corroborated Ms. Zark's testimony that the Respondent stole \$21,366.30 due the Claimants under the Agreement, based on her review of relevant documents from the Police and District Court. Accordingly, I find that the Claimants and Schwartz were parties to the Agreement from at least January through December 2013. I also find that Schwartz assigned the Respondent, a licensed real estate salesperson, to manage the Properties from January through September 2013. I further find that pursuant to the Agreement, Schwartz was obligated to pay the Claimants \$1,584.00 per month from rental fees collected on the Woodland Property and \$1,488.00 per month from rental fees collected on the Cedarhurst Property. Finally, I find that as a result of the Respondent's misconduct, which included theft and misrepresentation, the Respondent caused the Claimants an actual loss of \$21,366.30.

## CONCLUSIONS OF LAW

I conclude the following:

- A. The Claimants suffered an actual loss as a result of the Respondent's misconduct. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2) (Supp. 2015); COMAR 09.11.03.04.
- B. The Claimants are entitled to compensation from the Guaranty Fund in the amount of \$21,366.30. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(b) & 17-410(b) (Supp. 2015); See COMAR 09.11.01.18.

**RECOMMENDED ORDER**

I **RECOMMEND** that the Maryland Real Estate Commission **ORDER** the following:

- A. The Guaranty Fund award the Claimants \$21,366.30.
- B. The Respondent is ineligible for a license until she, at a minimum, (i) repays in full the amount paid by the Guaranty Fund to the Claimants, plus interest, and (ii) applies to the Commission for reinstatement or reissuance of a license.
- C. The records and publications of the Maryland Real Estate Commission shall reflect its final decision.<sup>7</sup>

**SIGNATURE ON FILE**

February 23, 2016  
Date Decision Issued

\_\_\_\_\_  
Michael D. Carlis  
Administrative Law Judge

MDC/da  
#160801

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<sup>7</sup> The Guaranty Fund recommended an award from the Guaranty Fund but took no position on whether the appropriate amount should be \$20,676.50 or \$21,366.30.

CERTIFIED MAIL - RETURN RECEIPT REQUESTED  
FIRST CLASS MAIL

March 16, 2016

Lesley Dale Zark  
Rainer Uwe Jettmar  
5680 Jenifer Street  
Washington, DC 20015

Michele Phillips-Alley  
307 Seven Oaks Lane  
Lothian, Maryland 20711

**RE: In the Matter of the Claim of Lesley Dale Zark and Rainer Uwe Jettmar against the Maryland Real Estate Guaranty Fund for the Alleged Misconduct of Michele Phillips-Alley  
Case No. 426-RE-2015 GF**


Dear Mr. Zark, Ms. Jettmar, and Ms. Phillips- Alley

Enclosed are your copies of the Proposed Order of the Commission issued in **In the Matter of the Claim of Lesley Dale Zark and Rainer Uwe Jettmar against the Maryland Real Estate Guaranty Fund for the Alleged Misconduct of Michele Phillips-Alley** heard by an Administrative Law Judge on December 2, 2015.

The Claimant(s) and/or Respondent(s) have the right to file Exceptions to the Proposed Order and to present Arguments to the Commission. Written exceptions to the Proposed Order or a Request to Present Arguments must be filed with the Commission within 20 days of the postmark date of this letter enclosing the Proposed Order.

Should the Claimant(s) and/or Respondent(s) fail to make his and/or their Exceptions and Request to Present Arguments known to the Commission within the time specified, the Proposed Order of the Commission shall be deemed final 20 days after the postmark date on this letter and attached Proposed Order. An appeal of the Proposed Order must be filed within 30 days of the date on which the Proposed Order becomes final and may be sought in the Circuit Court of Maryland in the county in which the applicant for judicial review resides or has his principal place of business, or in the Circuit Court for Baltimore City. For more detailed information on the appeal process, please see Section 10-222, State Government Article, Annotated Code of Maryland and Maryland Rules of Procedure 7-200 through 7-210. You should also be aware that in the event you decide to file an appeal, you will be responsible for obtaining and paying for a copy of the transcript of the hearing before the Office of Administrative Hearings. You should contact the Office of Administrative Hearings to determine which reporting service will be able to provide you with the transcript.

Sincerely,

  
Katherine F. Connelly  
Executive Director

KFC/bai  
Enclosure: Copy of Proposed Order

PHONE: 410-230-6200 • EMAIL: [d1mrec-dllr@maryland.gov](mailto:d1mrec-dllr@maryland.gov) • INTERNET: [www.dllr.maryland.gov](http://www.dllr.maryland.gov)