

THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF	*	BEFORE MICHAEL D. CARLIS,
THE CLAIM OF	*	ADMINISTRATIVE LAW JUDGE
RICHARD HALL, CLAIMANT	*	OF THE MARYLAND OFFICE OF
V.	*	ADMINISTRATIVE HEARINGS
THE MARYLAND REAL ESTATE	*	
COMMISSION GUARANTY FUND	*	OAH NOS: DLR-REC-22-12-11593
FOR THE ALLEGED MISCONDUCT	*	
OF SUE ANNE WILLISON,	*	MREC NO: 2012-RE-043 G.F.
REAL ESTATE BROKER	*	
* * * * *	*	* * * * *

**PROPOSED ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated August 20, 2012, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 17th day of October, 2012,

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**

10/18/12  
Date

By: \_\_\_\_\_  
Marla S. Johnson, Commissioner

IN THE MATTER OF THE CLAIM OF  
RICHARD HALL,  
CLAIMANT,

v.

THE MARYLAND REAL ESTATE  
COMMISSION GUARANTY FUND  
FOR THE ALLEGED MISCONDUCT OF  
SUE ANN WILLISTON, 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-22-12-11593  
\* MREC COMPLAINT No.: 12-RE-043GF

\* \* \* \* \*

**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 August 9, 2011, Richard A. Hall (Claimant) filed a claim for compensation from the Maryland Real Estate Commission (MREC) Guaranty Fund (Fund).<sup>1</sup> The Claimant sought \$5,044.00 for an actual loss allegedly caused by Sue Ann Williston's (Respondent) misconduct

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<sup>1</sup> The MREC is a constituent unit of the Department of Labor, Licensing, and Regulation (Department).

in the provision of real estate brokerage services.<sup>2</sup>

On March 7, 2012, the MREC ordered a hearing on the claim. On March 9, 2012, the MREC transmitted the matter to the Office of Administrative Hearings (OAH) for a hearing.

On May 22, 2012, the OAH convened a hearing in Frederick, Maryland. The Claimant represented himself. The Respondent did not appear.<sup>3</sup> Kris M. King, Assistant Attorney General, and the Office of the Attorney General, represented the MREC 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 (2009 & Supp. 2011); COMAR 09.01.02, 09.01.03, and 09.11.03; and 28.02.01.

### ISSUES

The issues are:

A. Whether the Claimant sustained an actual loss as a result of an act or omission of the

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<sup>2</sup> "Provide real estate brokerage services" is:

(l) to engage in any of the following activities:

(1) for consideration, providing any of the following services for another person:

- (i) selling, buying, exchanging, or leasing any real estate; or
- (ii) collecting rent for the use of any real estate;

(2) for consideration, assisting another person to locate or obtain for purchase or lease any residential real estate;

(3) engaging regularly in a business of dealing in real estate or leases or options on real estate;

(4) engaging in a business the primary purpose of which is promoting the sale of real estate through a listing in a publication issued primarily for the promotion of real estate sales;

(5) engaging in a business that subdivides land that is located in any state and sells the divided lots; or

(6) for consideration, serving as a consultant regarding any activity set forth in items (1) through (5) of this subsection.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(l) (2010).

<sup>3</sup> On April 18, 2012, the Respondent received the OAH's Notice of Hearing, with the MREC's Order of Hearing attached. Therefore, the Respondent received proper notice of the hearing. *See* Code of Maryland Regulations (COMAR) 28.02.01.05; COMAR 09.01.02.05. On November 22, 2011, pursuant to a consent order issued by the MREC, the Respondent had agreed "not to contest Guaranty Fund claims submitted by Complainants." The Claimant was one of many individuals who filed complaints against the Respondent with the MREC.

Respondent that constitutes theft, embezzlement, false pretenses, forgery, misrepresentation, or fraud; and, if so,

B. What amount of compensation from the MREC Guaranty Fund, if any, should be awarded to the Claimant.

**SUMMARY OF THE EVIDENCE**

**Exhibits**

Jt. 1, Report of Investigation, with attachments, was admitted for the parties.

The Claimant offered no additional exhibits.

The following were admitted for the Fund:

G.F. 1: Notice of Hearing with certified mail receipts;

G.F. 2: Order for Hearing;

G.F. 3: The Respondent's licensing history;

G.F. 4: Affidavit of Steven Long; and

G.F. 5: MREC Complaint and Guaranty Fund Claim.

**Testimony**

The Claimant testified for himself.

Jack L. Mull, Jr., Investigator, testified for the Fund.

**FINDINGS OF FACT**

I find the following by a preponderance of the evidence:

1. At all times relevant to this matter, the MREC licensed the Respondent as a Real Estate

Salesperson<sup>4</sup> under registration number 527749. The Respondent was the sole owner and operator of West Patrick Property Solutions (WPPS), LLC.

2. On a date not made clear in the record, the Claimant and Respondent executed a management agreement. The Respondent agreed to lease and manage the Claimant's residential property in Frederick, Maryland (Property).
3. On November 4, 2010, the Respondent executed a Residential Dwelling Lease For Maryland (Residential Lease) on behalf of the Claimant with Joseph and Heather C. (Tenants). The Tenants agreed to pay \$1,600.00 per month as rent, a security deposit of the same amount, and a pet deposit of \$200.00. The Claimant also provided the Respondent with \$300.00 to be used at her discretion for minor maintenance to the Property.
4. The Respondent collected the security and pet deposits and monthly rent. The Respondent regularly remitted the monthly rent, minus her fee, to the Claimant until March 2011. The Respondent did not remit the Tenants' rent payments to the Claimant for March and April 2011. In addition to the rent for March and April 2011, the Respondent also collected a late fee of \$80.00 for April's rent because the Tenants paid that rent more than five days after it was due.
5. On April 5, 2010, the Claimant instructed the Respondent to terminate their management agreement. The Claimant requested that the Respondent return the money she had collected under the management agreement.
6. The Respondent did not return any money to the Claimant. She kept \$5,060.00, which included the following: (i) the net proceeds from rent for March and April 2011 (\$2,880.00),

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<sup>4</sup> A "licensed real estate sales person" is "unless the context requires otherwise, a real estate salesperson who is licensed by the [Maryland Real Estate] 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).

the fee for the Tenants' late rent in April (\$80.00), the security deposit (\$1,600.00), the pet deposit (\$200.00), and the maintenance fund (\$300.00).

7. On August 9, 2011, the Claimant filed a claim with the MREC Guaranty Fund for \$5,044.00.

## 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) (2010).<sup>5</sup> The burden is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009); *see* COMAR 09.01.02.16.

Section 17-404 governs claims against the 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 \$25,000 for each claim.

*See also* COMAR 09.11.03.04.

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

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<sup>5</sup> All subsequent citations to the Business Occupations and Professions Article shall be to sections only.

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 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

The Claimant owns the Property, located in Frederick, Maryland. The Claimant testified that he “entered into a contract with [WPPS and the Respondent] to provide property management for [the Property].”

A Residential Lease was executed on November 4, 2010, between WPPS, for the Claimant, and the Tenants. By the terms of the Residential Lease, the Tenants leased the Property until November 30, 2012, for \$1,600.00 per month. The Tenants also agreed to pay a security deposit of \$1,600.00 and a “pet deposit” of \$200.00.

The Claimant testified that problems developed with the Respondent sometime after December 2010. At that time, according to the Claimant's testimony, the Respondent was unresponsive to his telephone calls and email.<sup>6</sup> But, the Claimant's “biggest concern” was the Respondent's failure to remit the Tenants' rent to him.

The Claimant testified that his claim is set forth his complaint to the Commission. He claimed “under penalty of perjury” the following:

Failure to pay rent proceeds to property owner for the months of March April 2011. Failure to release escrow funds or spare keys at contract termination to new property manager or tenants. Failure to pay utility bills for property that was under their management. Failure to communicate when requests are made via phone or email to prop[erty].

Escrow owed to current tenants \$1,600.00 security deposit, plus \$200

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<sup>6</sup> During this time, the Claimant lived in Texas.

pet deposit. Total \$1,800.00. Escrow for maintenance \$300.00. Rent  
[] proceeds to owner \$2944.00.

[Total Claim]: \$5,044.00.

The record includes copies of the Tenants' rent checks for March and April 2011, issued to WPPS on March 5, 2011, for \$1,600.00 and on April 7, 2011, for \$1,680.00. The Claimant testified that, after he terminated the management agreement, the Respondent failed to remit those rent payments to him. The Claimant acknowledged that the Respondent was entitled to retain a management fee \$160.00 for each month's rent. The Respondent also claimed an additional \$64.00 related to Tenant's late payment of rent for April 2011. On cross examination, he acknowledged that he did not know whether the Respondent had actually collected the late fee. The Tenants' check for the rent for April 2011, however, is for \$80.00 more than the amount of rent.

The Lease Agreement also contains a "Security Deposit – Payment and Receipt" provision. It shows that the Respondent collected \$1,600.00 for a security deposit and \$200.00 for a pet deposit from the Tenants on November 5, 2010. The Claimant also testified that the Respondent told him that the Tenants had paid these deposits.

The Claimant testified that he paid \$300.00 to the Respondent "via web bill pay" for a "maintenance account" to use for minor repairs to the Property. When asked by the Fund whether he had documentation of the payment, the Claimant testified, "Not at this time." However, he also testified to a distinct memory of making the payment. According to the payment, when he received an electronic bank statement after the payment, he opened the check and saw it was the check for \$300.00 that he issued to the Claimant. He also testified: "The Respondent] had to receive that payment for me to enter into a contract with her. So, if I did not



pay that to her there could be no contract with her as my property manager.”<sup>7</sup> Further, according to the Claimant, he tried to get confirmation of the payment from the bank for the hearing, but his account has been closed for so long, it was not available.

The Claimant testified that he terminated his contract with the Respondent because she was not responsive to his concerns about her management of the Property.<sup>8</sup> On April 1, 2011, the Claimant emailed the following to the Claimant: “I have been very patient as a property owner, however my [patience is] exhausted. I request that you terminate my account and forward all funds to me, including the maintenance fee and escrowed funds, so they can be applied to my new property manager’s account. I am currently still waiting for my March check.” According to the Claimant, he has never received any of the rent proceeds since February 2011, and has not received the security and pet deposits or the money from the management fund.<sup>9</sup>

### Analysis

The Fund recommended an award of \$4,980.00. The difference between the Fund’s recommendation (\$4,980.00) and the Claimant’s claim (\$5,044.00) is \$64.00, which is the amount the Claimant claims as a late rental fee. As discussed below, the Respondent actually collected \$80.00 as a late fee for the Tenants’ rent payment for April 2011.

Based on the Claimant’s testimony and the exhibits, I find that the Respondent to manage the Property and collect various fees and payments from the Tenants. I also find that during the management term, the Respondent collected \$3,200.00 from the Tenants for rent for March and April 2011, \$1,600.00 from the Tenants for a security deposit, \$200.00 from the Tenants for a

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<sup>7</sup> The maintenance contract was not offered as an exhibit.

<sup>8</sup> A different company currently manages the Property. The tenants are the same.

<sup>9</sup> Mr. Mull testified that his investigation consisted of a review of documents. The documents are part of the record as attachments to Mr. Mull’s report. Mr. Mull acknowledged that he did not interview the Claimant or Respondent

pet deposit, \$300.00 from the Claimant for a maintenance fund, and \$80.00 from the Tenants for late payment of April's rent. I further find, that although the Respondent request these funds and payment be returned to him at the end of the management agreement, the Respondent has wrongfully kept them. Based on the Respondent's theft of those proceeds, I find that the Claimant has incurred an actual loss.

The MREC Fund has recommended compensation from the Fund of \$4,980.00, which includes the net proceeds for rent from March and April 2011 (2,880.00), rent), the security deposit (\$1,600.00), the pet deposit (\$200.00), and the maintenance fee (\$300.00). While I agree with the MREC Fund's recommendation of an award from the Fund, I recommend that the amount of compensation should be \$5,044.00.

The Residential Lease provides that the "[t]enant agrees to pay rent when due without any deduction or setoff. If a monthly installment of rent is paid more than five (5) days . . . after the date when due, Tenant shall pay, as an additional rent, a sum equal to five (5) % of the amount of the delinquent rent due." Jt. 1, Attachment 3, page 3.

Under the Residential Lease, rent was due on the first day of each month. The Tenants paid April's rent on April 7, 2011, more than five days after the due date. Therefore, the Respondent was obligated to collect a five percent late fee, or \$80.00 ( $\$1,600.00 \times 5\% = \$80.00$ ). This amount is, in fact, exactly what the Respondent collected from the Tenants as their rental payment in April (\$1,880.00), based on the cancelled check in the record.<sup>10</sup> Therefore, I recommend that the Claimant's compensation from the Fund include part of the late rental payment.

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<sup>10</sup> The Claimant's testimony that the late fee was \$64.00 was incorrect. The Residential Lease clearly shows the late fee was 5% of the rent, or \$80.00.

The Claimant is not entitled to compensation for the full amount of the late payment because adding the full amount to the Claimant's other losses would exceed the amount of the Claimant's claim. The MREC Fund recommends compensation of \$4,980.00, which represents the net proceeds for rent payments for March and April 2011 (\$2,880), the security deposit (\$1,600.00), the pet deposit (\$200.00), and the amount of the maintenance fund (\$300.00). I agree with the MREC Fund's recommendation that the Claimant should be awarded compensation from the Fund for those losses. However, the Fund seemed to take the position that the Respondent had not collected any late rental fees. As discussed above, I have found that the Respondent collected a late fee of \$80.00 for April's rent. When \$80.00 is added to the Claimant's other losses (\$4,980.00), the total is \$5,060.00, or \$16.00 more than the Claimant's claim of \$5,044.00. Because the total amount of the Claimant's actual loss is limited to the amount the Claimant requested in the claim, I recommend that the MREC award the Claimant \$5,044.00 to compensate him for his actual loss (\$2,880.00 (rent) + \$1,600.00 (security deposit) + \$200.00 (pet deposit) + \$300.00 (maintenance fund) + \$64.00 (of the total late fee of \$80.00) = \$5,044.00.

### **CONCLUSIONS OF LAW**

I conclude the following:

- A. The Claimant suffered an actual loss as a result of the Respondent's misconduct. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2), (3) (2010).
- B The Claimant is entitled to compensation from the Guaranty Fund in the amount of \$5,044.00. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a); 17-419(a) (2010).

**RECOMMENDED ORDER**

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

- A. The Claimant's claim for reimbursement from the Fund is **ACCEPTED**.
- B. The Guaranty Fund shall pay \$5,044.00 to the Claimant.
- C. The Respondent shall reimburse the Guaranty Fund the full amount paid to the Claimant, plus annual interest of at least ten percent.
- D. If applicable and not contrary to the relevant Consent Order, the Respondent's license is suspended. The Guaranty Fund shall not reinstate or reissue a license to the Respondent until (i) she repays in full the amount paid by the Guaranty Fund to the Claimant, plus interest, and (ii) she applies to the MREC for reinstatement or reissuance of a license.
- E. The records and publications of the Maryland Real Estate Commission shall reflect its final decision.

**SIGNATURE ON FILE**

August 20, 2012  
Date Decision Mailed

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

MDC/ch  
# 13673