

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *

v. *

**HARRY SINCLAIR, JR.
Respondent**

*** CASE NO. 2009-RE-583**

And

*** OAH NO. DLR-REC-24-11-14645**

**CLAIM OF BONNIE CRUEA
AGAINST THE MARYLAND REAL ESTATE
GUARANTY FUND ***

*** * * * ***

OPINION AND FINAL ORDER

This matter came before the Maryland Real Estate Commission (“Commission”) on argument on Exceptions filed by the Respondent, Harry Sinclair, Jr., to the Proposed Order of December 20, 2011. On October 11, 2011, Administrative Law Judge William C. Herzing (“ALJ”) filed a Proposed Decision and Recommended Order in which he recommended that the Respondent’s real estate license be suspended for 30 days; that the Respondent pay a civil penalty of \$3,500.00; and that the Claimant’s claim against the Maryland Real Estate Guaranty Fund (“Guaranty Fund”) be allowed in the amount of \$3,500.00.

On December 20, 2011, the Commission issued a Proposed Order that affirmed the Findings of Fact and Conclusions of Law in the Proposed Decision and Recommended Order of the ALJ. The Commission, in its Proposed Order, amended the Recommended Order of the ALJ as follows:

“ORDERED that the Respondent Harry Sinclair, Jr., violated Md. Bus. Occ. and Prof. Art. § 17-322 (b) (25), (32), and (33); § 17-532 (c) (1) (iv); and COMAR 09.11.02.01C;

ORDERED that all real estate licenses held by the Respondent Harry Sinclair, Jr., be SUSPENDED for 30 days;

ORDERED that the Respondent Harry Sinclair, Jr. be assessed a civil penalty in the amount of \$5,000.00, which shall be paid within thirty (30) days of the date of this Proposed Order;

ORDERED that the claim of Bonnie Cruea against the Maryland Real Estate Guaranty Fund be GRANTED in the amount of \$3,500.00;

ORDERED that all real estate licenses held by the Respondent Harry Sinclair, Jr. shall be SUSPENDED until the civil penalty is paid in full and the Guaranty Fund is repaid, together with all interest due, and that this suspension is in addition to the 30-day disciplinary suspension;

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

A hearing on the Exceptions filed by the Respondent was held by a panel of Commissioners, consisting of Commissioners J. Nicholas D’Ambrosia, Marla S. Johnson, and Jeff M. Thaler, on April 18, 2012. Jessica Berman Kaufman, Assistant Attorney General, represented the Commission. The Respondent, who was present and testified at the Exceptions’ hearing, was represented by J. Brian Tansey, Esquire. Bonnie Cruea, who filed a claim against the Maryland Real Estate Guaranty fund in this case, was present and testified. The proceedings were electronically recorded.

SUMMARY OF THE EVIDENCE

On behalf of the Commission, four exhibits, as well as the Office of Administrative Hearings' case folder containing the exhibits entered into the record at the hearing before the ALJ, were entered into the record.

PRELIMINARY MATTERS

Mr. Tansey argued that the ALJ had made an erroneous Finding of Fact which was affirmed by the Commission in its Proposed Order. Specifically, he contended that Mr. Sinclair was not a licensed real estate broker but has been a licensed real estate salesperson since ending his military service in 1996. A review of the Commission's licensing record as well as the Commission's Amended Statement of Charges and Order for Hearing, which were admitted as Commission's Exhibit 2 at the hearing before the ALJ discloses that, at all times relevant to this case, the Respondent was a licensed real estate salesperson not a licensed real estate broker.

Mr. Tansey, in presenting the Respondent's Exceptions to the Commission's Proposed Order, proffered information, in order to contest the ALJ's Findings of Fact, which was not part of the ALJ's Findings of Fact. Ms. Kaufman objected on the grounds that a party who has filed Exceptions and is contesting the factual findings in the Proposed Order must file with the Commission three copies of the transcript of the hearing before the ALJ no less than ten days before the scheduled Exceptions' hearing or is bound by the factual findings in the Proposed Order. A transcript of the hearing before the ALJ was not filed with the Commission. The Commission sustained Ms. Kaufman's objection based on Code of Maryland Regulations ("COMAR") 09.01.03.09I, which provides:

“I. If the transcript has not been filed or otherwise made part of the record in the case, the parties at the hearing on exceptions may not refer to any testimony before the ALJ which was not incorporated into the ALJ’s findings of fact or conclusions of law.”

FINDINGS OF FACT

The Commission adopts the Findings of Fact recommended by the ALJ with the exception of the first sentence of Finding of Fact number 1. in the ALJ’s Proposed Decision of October 11, 2011. The Commission has determined, as stated above, that the Respondent was a licensed real estate salesperson at all times relevant to this matter and, therefore, strikes the first sentence of Finding of Fact number 1. in the ALJ’s Proposed Decision and substitutes in its place the following sentence: “At all times relevant to this matter, the Respondent was a licensed real estate salesperson.”¹

DISCUSSION

At all relevant times, the Respondent, Harry Sinclair, Jr., was a licensed real estate salesperson. On or about January 17, 2007, the Respondent listed his home, located at 1371 Odenton Road, Odenton, Maryland 21113 (the “Property”), for sale. FF 2.² In the “Features” section of the listing, amenities include fireplace mantels. In the “Remarks” section of the listing is the following statement: “Huge sandstone fireplace in living room and gas fireplace in family room...”. FF 3. On March 3, 2007, the Claimant made a contract offer of \$410,000.00 for the property and the parties signed the contract acceptance on March 19, 2007. FF 4.

The Respondent completed a Maryland Residential Property Disclosure Statement (“Disclosure Statement”) in which he stated the following: 1) The heating system was

¹ The fact that the Respondent was a licensed real estate salesperson not a licensed real estate broker, as was stated in the ALJ’s Findings of Fact, does not affect the Commission’s analysis or decision in this case.

² “FF” refers to the ALJ’s Finding of Fact.

oil and was in operating condition; 2) The air conditioning system was operational and was 16 years old; 3) The hot water heater was 20 years old; 4) There were no problems with the electrical system; and 5) There was insulation in the exterior walls and ceiling/attic. FF 5. The Respondent checked “no” in response to a question whether there were hazardous materials, including asbestos, lead based paint or underground storage tanks. FF 6. The Respondent completed a Federal Lead Paint Disclosure on which he stated he had no knowledge of lead based paint. FF 7.

A home inspection of the Property was completed on March 21, 2007 and revealed the following: 1) Attic insulation consisted of fiberglass batts of 3-5 inches. The insulation was noted to be inadequate by today’s standards; 2) Some of the windows were painted shut, sash balances were broken or defective and some window panes were cracked or broken; 3) Electrical system junction box covers were missing, there was a missing switch cover plate and a smoke detector button did not respond. The 100 amp service was inadequate and the inspector recommended an upgrade; 4) The water heater age was listed as 10-15 years with a design life of 15-20 years; 5) The heating system was identified as oil with a fuel oil tank. The inspector operated the heating system with the thermostatic controls; 6) The air conditioning system was not tested because the ambient temperature was below 65 degrees. The age was listed as 5-10 years with a design life of 15-20 years; and 7) The refrigerator and gas range/oven were inspected and no defects noted. FF 8. Gwendolyn Edwards (“Edwards”), the Claimant’s agent, faxed the Respondent a list of repairs and he responded in an email, on March 25, 2007, that, “[T]he requested fixes look very doable...” FF 9.

A lead based paint inspection conducted on March 29, 2007 disclosed high levels of lead based paint in the Property. The Respondent agreed to pay the Claimant a \$6,000.00 credit at settlement. FF 10. After the Property was appraised, the Claimant and Respondent agreed to a reduced purchase price of \$400,000.00 and to eliminate the \$6,000.00 credit. FF 11.

The Claimant did a walk-through inspection of the Property on June 29, 2007, prior to settlement. Edwards faxed the Respondent a list of defects including: 1) Ceiling tiles in the kitchen appeared saturated with water and were hanging from the ceiling; 2) The landing of the main staircase was damp and interior walls appeared to be buckling; and 3) A gas fireplace exhaust pipe and mantel in the family room were removed. FF 12. On July 10, 2007, the Claimant submitted an addendum to the contract of sale for a credit of \$3,500.00 for the mantel. The Respondent refused to accept the addendum, stating that the mantel was not included in the offer and was not part of the sale. FF 13. The Claimant performed a final walk-through inspection on the day of settlement, July 11, 2007, at which time baseboards were loose from the wall, switch plates were missing, the ceiling tiles in the kitchen were bowed and there was debris left in the barn. FF 14.

The following conditions existed when the Claimant moved into the Property on July 12, 2007: 1) Switch plates were missing from the walls; 2) Ornate vent covers were missing; 3) There were hanging telephone wires; 4) Baseboards were missing; 5) The fireplace mantel was removed; 6) A gate was damaged; and 7) There was debris in the barn. FF 15. Since moving into the Property, the Claimant has replaced the refrigerator, HVAC system, hot water heater and stove. FF 16. The following conditions also existed on the Property: 1) An electric line running to the garage did not have

conduit; 2) There was improper grounding and loose connections in receptacles, switches and junction boxes; 3) Windows were painted shut; and 4) There was a leak in the upstairs bathroom into the kitchen ceiling. FF 17.

In a letter to the Commission, the Respondent had stated that many of the complaints arose against him acting as a seller and not as a licensee, implying that he was not, therefore, subject to disciplinary action by the Commission in regard to the transaction with the Claimant. REC 4, pg. 74-75.³ In *Nelson v. Real Estate Comm'n.*, 35 Md. App. 334, 339 (1977), the Court of Special Appeals addressed this issue and construed the Commission's jurisdiction as follows:

“ The statute specifically confers jurisdiction upon the Commission to investigate not only real estate brokers and salesmen but also those who “assume to act” as brokers or salesmen.

We think it would be seriocomic to construe [the statute] so as to allow the Real Estate Commission to call to task those brokers who violated the Commission's precepts while acting as brokers and at the same time carve from the Commission's jurisdiction the very same violations, committed by the identical broker, in a non-broker capacity. In the former instance, the broker might be branded as unethical but in the latter, even though the broker committed the same violation, he would retain, officially, his good character.”

The Commission concludes that the same reasoning set forth by the Court in the *Nelson* case applies in situations where a salesperson sells his own home. Therefore, the Commission finds that it has jurisdiction to regulate the conduct of a licensed real estate professional such as the Respondent where the licensed real estate professional is selling his own home.

Counsel for the Respondent argued at the Exceptions' hearing that although the Respondent should have indicated “unknown” on the Disclosure Statement regarding the existence of lead paint and should have indicated that the mantel did not convey, those

³ “REC” refers to exhibits entered into the record at the ALJ's hearing by the Commission.

issues were resolved at settlement as indicated by the fact that the Claimant's agent did not request that money be placed in escrow until those issues were resolved.

The Respondent was charged by the Commission with violations of Md. Code Ann., Bus. Occ. & Prof. §§17-322 (b) (25), (32) and (33) and 17-532 (c) (i) (iv) and COMAR 09.11.02.01C. Those sections of the Maryland Real Estate Law and the Code of Maryland Regulations provide as follows:

§17-322.

. . .

(b) Subject to the hearing provisions of § 17-324 of this subtitle, the Commission may deny a license to any applicant, 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;

. . .

(32) violates any other provision of this title;

. . .

(33) violates any regulation adopted under this title or any provision of the code of ethics [.]

§17-532.

. . .

(c) (1) A licensee shall:

. . .

(iv) treat all parties to the transaction honestly and fairly and answer all questions truthfully.

COMAR 09.11.02.01C.

01. Relations to the Public.

- C. The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.

The Respondent was a licensed real estate salesperson at the time of the transaction involving the Property and should have known the requirements regarding disclosures relating to a property. Nonetheless, the Respondent made misrepresentations on the Disclosure Statement by stating that there was no lead based paint or underground storage tank. In addition, the Respondent made a misrepresentation in the listing regarding the fireplace mantel by stating that it was a feature of the home but refusing to convey the mantel at the time of settlement.

The ALJ noted that the Respondent admitted that he had made a mistake by omitting the existence of the underground oil tank on the Disclosure Statement and claimed the he did not know there was lead based paint in the Property. The ALJ, who had the opportunity to observe the Respondent's demeanor and evaluate the Respondent's testimony, did not find his arguments in regard to the underground tank and lead based paint convincing. Further, the ALJ found that the Respondent's testimony that the mantel was not a fixture in the house and was not attached to the wall was clearly refuted by photographs of the mantel before it was removed and the condition of the floor and baseboard after the mantel was removed. The ALJ concluded that the mantel was affixed to the wall prior to its removal and concluded that the observable condition of the mantel, as well as the language in the listing for the Property, created the unmistakable

impression that the mantel was a feature to be included in the sale of the house. The Commission concludes that the determination that the Respondent had made misrepresentations in regard to the existence of an underground oil tank and lead paint, as well as to whether the mantel was a feature which would convey upon the sale of the Property, was supported by the evidence and testimony presented at the hearing before the ALJ.

The Respondent also stated in the Disclosure Statement that there were no problems with the electrical system, including fuses, circuit breakers, outlets or wiring. At the hearing before the ALJ, the Claimant presented a statement from an electrician that there was improper grounding and loose connections in receptacles, switches and junction boxes. The Commission therefore concludes that the Respondent made misrepresentations about the electrical wiring.

The Commission concurs with the ALJ's determination that the evidence presented at the hearing does not support a conclusion that the Respondent made misrepresentations in regard to the HVAC systems, water heater, appliances and insulation.

The Commission notes that in addition to failing to accurately answer questions on the Disclosure Statement regarding the existence of an underground oil tank and lead paint in the Property, the Respondent improperly removed the fireplace mantel, switch plates and ornate vent covers at the Property. He also left telephone wires hanging, removed baseboards, damaged a gate and left debris in the barn.

Based on the evidence and testimony presented at the hearing before the ALJ, the Commission concludes that the Respondent engaged in conduct that demonstrated bad

faith and dishonest and improper dealings with the Claimant in violation of Md. Code Ann., Bus. Occ. & Prof. § 17-322(b) (25). The Respondent also failed to comply with his obligation to treat all parties to the transaction honestly and fairly and to answer all questions truthfully in violation of Md. Code Ann., Bus. Occ. & Prof., § 17-532 (c) (1) (iv). By violating Md. Code Ann., Bus. Occ. & Prof., § 17-532 (c) (1) (iv), the Respondent has also violated Md. Code Ann., Bus. Occ. & Prof., § 17-322 (b) (32). The Respondent, by his conduct, failed to protect the Claimant against his misrepresentations and engaged in actions which could be damaging to the dignity and integrity of the real estate profession in violation of COMAR 09.11.02.01C. and Md. Code Ann., Bus. Occ. & Prof., §17-322 (b) (33).

The Respondent is subject to sanction for his conduct pursuant to Md. Code Ann., Bus. Occ. & Prof., § 17-322(c). Instead of or in addition to reprimanding, suspending or revoking a real estate license for the above cited violations, Md. Code Ann., Bus. Occ. & Prof., § 17-322 (c) permits the assessment of up to a \$5,000.00 per violation. To determine the amount of the penalty to be imposed, the Commission is required to consider the following criteria:

- 1) the seriousness of the violation;
- 2) the harm caused by the violation;
- 3) the good faith of the licensee; and
- 4) any history of previous violations by the licensee.

Although the Respondent has no history of prior violations, the Commission finds that the violations in this case are serious. The Respondent misrepresented the existence of hazardous materials on the Property and the condition of the electrical system in the

Property. He misrepresented that a fireplace mantel would convey with the Property. The Respondent failed to complete agreed upon repairs; removed switch plates, and ornate vent covers and left the Property in disarray. The Respondent's actions caused harm to the Claimant who was required to incur expenses for the replacement of the fireplace mantel, for repairs, and for the removal of the Respondent's personal property from the premises. The Respondent's conduct in regard to the sale of the Property to the Claimant evidenced a lack of good faith and honesty. Therefore, the Commission concludes, based on an evaluation of the criteria noted above, that the appropriate disciplinary sanctions in this case are the suspension of all real estate license held by the Respondent for a period of 30 days and the assessment of a civil penalty in the amount of \$5,000.00.

The Claimant, Bonnie Cruea, filed a claim for reimbursement from the Maryland Real Estate Commission Guaranty Fund . At the Exceptions' hearing, Ms. Cruea stated that she would not have purchased the Property if the Respondent had properly completed the Disclosure Statement. She denied that issues regarding the mantel or the lead based paint were resolved at settlement and stated that the Respondent had refused to sign the Addendum and left the room where settlement took place. Ms. Cruea stated that she has now spent approximately \$60,000.00 to make the Property livable and expressed her feeling that she had presented sufficient support for her claim against the Guaranty Fund. Ms. Cruea requested the Commission to uphold the Guaranty Fund award which was recommended by the ALJ.

Claims for reimbursement from the Guaranty Fund are governed by Md. Code Ann., Bus. Occ. & Prof., § 17-404, which provides, in pertinent part:

§17-404.

(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:

. . . .

3. a licensed real estate salesperson;

. . . .

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

(iii) be based on an act or omission

. . . .

2. that constitutes fraud or misrepresentation.

COMAR 09.11.03.04 further provides, with respect to claims against the Guaranty Fund:

04. Claims Against the Guaranty Fund.

A. A guaranty fund claim shall be based on the alleged misconduct of a licensee.

B. For the purpose of a guaranty fund claim, misconduct:

(1) Is an action arising out of a real estate transaction involving real estate located in this State which causes actual loss by reason of theft or embezzlement of money or property, or money or property unlawfully obtained from a person by false pretense, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit;

(2) Is performed by an unlicensed employee of a real estate broker or by a duly licensed real estate broker, associate broker, or salesperson; and

(3) Involves conduct for which a license is required by Business Occupations and Professions Article, Title 17, Annotated Code of Maryland.

COMAR 09.11.01.18 further 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 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.

The Claimant bears the burden of proof in a proceeding seeking an award from the Guaranty Fund. Md. Code Ann., Bus. Occ. & Prof., § 17-407 (e).

The Claimant sought an award from the Guaranty Fund based upon her alleged losses of \$117,814.00. The ALJ evaluated the numerous, itemized expenses for which the Claimant sought an award from the Guaranty Fund and determined that she was entitled to reimbursement from the Guaranty Fund for the fireplace mantel. That determination was based on the findings by the ALJ that: 1) the Respondent had made misrepresentations in regard to whether the mantel would convey upon the sale of the Property (which is located in the State) and 2) that the Claimant had sustained an actual loss to replace the missing mantel which the Respondent had represented would be part of the sale. The Claimant alleged that the cost to replace the mantel was \$5,500.00 based upon a page from GoAntiques.com showing a similar, but larger and more elaborate mantel than the mantel which was in the Property. The ALJ noted that after discovering that the mantel was missing, during her walk-through inspection prior to settlement, the Claimant had submitted an Addendum to the Respondent for a credit of \$3,500.00 and determined that the Claimant was entitled to an award from the Guaranty Fund for the amount she had originally requested from the Respondent. The Commission concurs

with the rationale provided for the award and the amount of the award as set forth by the ALJ in his Proposed Decision.

The Commission further concurs with the ALJ's determinations, for the reasons set forth in the Proposed Decision, that the Claimant is not entitled to awards from the Guaranty Fund for any of the remaining claims against the Guaranty Fund for expenses incurred in connection with the Property.

Therefore, the Commission concludes, based on the evidence presented at the hearing before the ALJ and in consideration of the factors to be considered in granting an award from the Guaranty Fund, that the Claimant has established that she has sustained an actual loss of \$3,500.00 which is compensable from the Guaranty Fund.

CONCLUSIONS OF LAW

Based upon the ALJ's Findings of Fact, as amended by this Final Order, which have been adopted by the Commission, and the foregoing Discussion, the Commission concludes, as a matter of law, that:

1. The Respondent, Harry Sinclair, Jr., engaged in conduct that demonstrates bad faith, incompetency, or untrustworthiness, or that constitutes dishonest, fraudulent, or improper dealings in violation of Md. Code Ann., Bus. Occ. & Prof., § 17-322 (b) (25).

2. The Respondent, Harry Sinclair, Jr., violated Md. Code Ann., Bus. Occ. & Prof., § 17-532 (c) (1) by failing to treat all parties to the transaction involving the sale of the Property honestly and fairly and by failing to answer all questions truthfully.

3. The Respondent's violation of Md. Code Ann., Bus. Occ. & Prof., § 17-532 (c) (1) also constitutes a violation of Md. Code Ann., Bus. Occ. & Prof., § 17-322 (b) (32) .

4. The Respondent violated COMAR 09.11.02.01C. by failing to protect the public against misrepresentation and by engaging in practices which could be damaging to the public or to the dignity and integrity of the real estate profession.

5. The Respondent's violation of COMAR 09.11.02.01C also constitutes a violation of Md. Code Ann., Bus. Occ. & Prof., § 17-322 (b) (33).

6. The Respondent, Harry Sinclair, Jr., is subject to sanctions for his conduct and a 30 day suspension of all real estate licenses which he holds and a \$5,000.00 civil penalty are appropriate sanctions. Md. Code Ann., Bus. Occ. & Prof., § 17-322 (c).

7. The Claimant, Bonnie Cruea, has established an "actual loss" recoverable from the Guaranty Fund, in the amount of \$3,500.00. Md. Code Ann., Bus. Occ. & Prof., §17-404.

ORDER

The Exceptions of the Respondent, Harry Sinclair, Jr., having been considered, it is this 8th day of June, 2012 by the Maryland Real Estate Commission, **ORDERED:**

1. That the Respondent, Harry Sinclair, Jr., violated Md. Code Ann., Bus. Occ. & Prof., § 17-322 (b) (25), (32), and (33); § 17-532 (c) (1) (iv); and COMAR 09.11.02.01C.;

2. That all real estate licenses held by the Respondent, Harry Sinclair, Jr., be **SUSPENDED** for thirty (30) days;

3. That the Respondent, Harry Sinclair, Jr., be assessed a civil penalty in the amount of **Five Thousand Dollars (\$5,000.00)**, which shall be paid within thirty (30) days of the date of this Order;

4. That the claim of Bonnie Cruea against the Maryland Real Estate Guaranty Fund be **GRANTED** in the amount of **Three Thousand Five Hundred Dollars (\$3,500.00)**;

5. That all real estate licenses held by the Respondent, Harry Sinclair, Jr., shall be **SUSPENDED** until the civil penalty is paid in full and the Guaranty Fund is repaid, together with all interest due, and that this suspension is in addition to the thirty (30) days disciplinary suspension; and

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

MARYLAND REAL ESTATE COMMISSION

By: SIGNATURE ON FILE

Note: A judicial review of this Final Order may be sought in the Circuit Court of Maryland in which the Appellant resides or has his/her principal place of business, or in the Circuit Court for Baltimore City. A petition for judicial review must be filed with the court within 30 days after the mailing of this Order.