

BEFORE THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM \* OAH NO. DLR-REC-22-15-07775  
OF PHILOMINA A. CHIBILI AGAINST \*  
THE MARYLAND REAL ESTATE \* MREC NO. 2014-RE-202 G.F.  
COMMISSION GUARANTY FUND, FOR \*  
THE ALLEGED MISCONDUCT OF \*  
HOLLIS T. BROWN \*

\* \* \* \* \*

PROPOSED ORDER

The Findings of Fact, Conclusions of Law, and Recommended Order of the Administrative Law Judge dated May 20, 2015, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 26<sup>th</sup> day of June, 2015

**ORDERED,**

A. That the Findings of Fact in the recommended decision be, and hereby are, **ADOPTED**;

B. That the Conclusions of Law in the recommended decision be, and hereby are, **AMENDED** to reflect that the Claimant is entitled to reimbursement from the Real Estate Guaranty Fund in the amount of \$11,375.64;

C. That the Recommended Order be, and hereby is, **AMENDED** as follows:

**ORDERED** that the Claimant, Philomina A. Chibili, be reimbursed

from the Maryland Real Estate Guaranty Fund in the amount of **Eleven Thousand Three Hundred Seventy-Five Dollars And Sixty-Four Cents (\$11,375.64)** to compensate for actual losses that she sustained because of the acts or omissions of the Respondent; and

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

D. Pursuant to §10-220 of the State Government Article, the Commission finds that the Recommended Decision of the Administrative Law Judge (ALJ) must be amended to include reimbursement from the Guaranty Fund for attorney's fees incurred by the Claimant in her effort to recover unremitted rental payments and a security deposit from the Respondent.

The ALJ denied Claimants' request for reimbursement for the attorney's fees based on COMAR 09.11.01.18, which provides that a claimant may not recover attorney's fees incurred in pursuing or perfecting the claim against the guaranty fund. It is clear from the record, however, that the fees in the instant case were related to a civil action filed in Howard County District Court. The court fees were directly related to the originating transaction because they were caused by the Respondent's failure to remit rental payments and the security deposit as required by the Management Agreement.

The Commission intended the restriction in 09.11.01.18 to apply to legal services directly related to the claim filed with

the Commission. It has not restricted the right of claimants to recover legal expenses incurred in an attempt to vindicate rights outside the claim process. The fees were not incurred in connection with the Guaranty Fund claim. Therefore, the Claimant is entitled to reimbursement from the Guaranty Fund for the attorney's fees.

E. Pursuant to COMAR 09.01.03.08 those parties adversely affected by this Proposed Order shall have 20 days from the postmark date of the Order to file exceptions and to request to present arguments on the proposed decision before this Commission. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202.

**SIGNATURE ON FILE**

Maryland Real Estate Commission

IN THE MATTER OF THE CLAIM OF  
PHILOMINA A. CHIBILI,  
CLAIMANT  
v.  
THE MARYLAND REAL ESTATE  
COMMISSION GUARANTY FUND,  
FOR THE ALLEGED MISCONDUCT OF  
HOLLIS T. BROWN,  
RESPONDENT

\* BEFORE MARLEEN B. MILLER,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\*  
\* OAH CASE No.: DLR-REC-22-15-07775  
\* MREC CASE No.: 14-RE-202  
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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On October 9, 2013, Philomina A. Chibili (the Claimant) filed with the Maryland Real Estate Commission (the Commission) a Complaint & Guaranty Fund Claim (the Claim) regarding the allegedly improper acts and omissions of a licensed real estate broker, Hollis T. Brown (the Respondent). On or about September 24, 2013, the Respondent entered into a Consent Order (the Order) with the Commission. Pursuant to that Order, the Respondent agreed to revocation of his broker's license and admitted that he had failed to account for and to remit money that came into his possession in his capacity as a property manager and pursuant to the property management agreements he had entered into with his clients.

After an investigation, the Commission issued its February 20, 2015 Order for Hearing against the Respondent, noting his admitted violation of section 17-322(b)(22) of the Maryland Annotated Code's Business Occupations and Professions Article (the Business Occupations Article). On February 24, 2015, the Commission forwarded the Order for Hearing to the Office of Administrative Hearings (OAH) to conduct a hearing and to issue a proposed decision and order in this case.

On May 15, 2015, I conducted a hearing at OAH's Administrative Law Building in Hunt Valley, Maryland, pursuant to Section 17-408 of the Business Occupations Article. The Claimant represented herself. Assistant Attorney General Kris King represented the Commission's Guaranty Fund (the Fund). Pursuant to the Order,<sup>1</sup> the Respondent did not attend the hearing and I proceeded to hear the case in his absence.<sup>2</sup>

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

### **ISSUES**

- Did the Claimant sustain an actual loss, compensable by the Fund, due to the Respondent committing acts or omissions involving theft, embezzlement, false pretenses, forgery, fraud, or misrepresentation?
- If so, what amount should be awarded to the Claimant from the Fund?

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<sup>1</sup> See Proposed Finding of Fact 13, at p. 6.

<sup>2</sup> Section 17-324 of the Business Occupations Article provides that if the individual, after receiving proper notice of the hearing, fails or refuses to appear, the Commission may hear and determine the matter despite the individual's absence. See also COMAR 28.02.01.23.

## SUMMARY OF THE EVIDENCE

### Exhibits

The Claimant submitted no documents for admission into evidence:

I admitted the Fund's documents into evidence as the following numbered exhibits:

1. April 20, 2015 Notice of Hearing
2. The Commission's February 20, 2015 Order for Hearing
3. The Respondent's licensing history, certified on September 5, 2014
4. Jack L. Mull, Jr.'s Report of Investigation, undated, with the following attachments:
  - The Claimant's October 9, 2013 Complaint & Guaranty Fund Claim
  - The Respondent's September 24, 2013 response to claims against him
  - Maryland SDAT printout for 9075 North Laurel Road, Unit C
  - August 6, 2008 Real Estate Management Agreement
  - June 1, 2012 Residential Lease Agreement
  - May 18, 2012 Security Deposit and Pet Deposit receipt
  - December 2012 email correspondence between the Claimant and the Respondent
  - January 2013 email correspondence between the Claimant and the Respondent
  - February 2013 email correspondence between the Claimant and the Respondent
  - February 20, 2013 letter from Francis Koh to the Claimant
  - 2012 and 2013 Internal Revenue Service Form 1099-MISC
  - Case search results, printed on November 12, 2014
  - The Respondent's August 2013 Statement for the Claimant's property
  - January 27, 2014 Order for Default Judgment

- Security Deposits printout for properties managed by the Respondent, prepared August 13, 2013
- October 24, 2013 Subpoena Duces Tecum to the Columbia Bank, with the Respondent's bank records for the period from July 31 through August 31, 2013
- August 15, 2013 letter from Patrick Richardson, the Commission's Fiscal Auditor, to J. Stephen Long, the Commission's Assistant Director
- September 24, 2013 Consent Order

I admitted no exhibits on the Respondent's behalf.

### Testimony

The Claimant testified on her own behalf. The Fund presented the testimony of Jack L. Mull, Jr., the Commission's investigator. Pursuant to the Order,<sup>3</sup> the Respondent presented no testimony at the hearing.

### **PROPOSED FINDINGS OF FACT**

I propose that the Commission find the following facts by a preponderance of the evidence:

1. At all relevant times, the Respondent was a licensed real estate broker for H. T. Brown Real Estate, Inc.
2. On or about November 26, 2003, the Claimant purchased property located at 9075 North Laurel Road, Unit C, in Laurel, Maryland (the Property).
3. On August 6, 2008, the Claimant entered into a Real Estate Management Agreement (the Management Agreement) with the Respondent, authorizing the Respondent to

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<sup>3</sup> See Proposed Finding of Fact 13, at p. 6.

4. lease and to manage the Property and creating a fiduciary relationship between the Claimant and the Respondent. Among other terms, the Management Agreement provided as follows:

- The Respondent was responsible for maintaining the Property, with the Claimant providing a \$200.00 deposit to be held in reserve by the Respondent for providing such maintenance (the Maintenance Reserve);
- The Respondent was required to collect, hold and return security deposits to any tenants;
- The Respondent was required to prepare and to provide to the Claimant statements of receipts, expenses and charges; and
- The Respondent was required to collect and to remit to the Claimant the monthly rent (minus a ten percent commission) received from any tenant leasing the Property.

5. On behalf of the Claimant, the Respondent entered into a June 1, 2012 Residential Lease Agreement (the Lease) with Catherine Childer and Todd Fussell (the Tenants) to lease the Property. The Tenants agreed to pay \$1,300.00 in monthly rent and provided a \$1,800.00 security deposit to the Respondent.

6. The Respondent collected monthly rent from the Tenants between approximately June 1, 2012 and March 1, 2013 and was required to remit the amount of that rent (minus the Respondent's ten percent commission) to the Claimant.

7. Although the Tenants consistently paid their monthly rent, the Respondent failed to remit a combined total of \$6,295.64 in rental proceeds owed to the Claimant.

8. The Respondent retained a total of \$780.00 as his ten percent management fee from the unremitted payments owed to the Claimant.



9. The Respondent failed to maintain in a trust account the Tenants' \$1,800.00 security deposit. The Respondent did not return this security deposit to the Tenants or to the Claimant.

10. The Respondent used the entirety of the \$200.00 Maintenance Reserve to cover expenses for the upkeep of the Property.

11. On February 20, 2013, the Claimant retained the services of Francis Koh, Esquire. Mr. Koh was retained to recover the unremitted rental payments and the Tenants' security deposit from the Respondent. The Claimant provided the Koh Law Firm a \$2,500.00 retainer fee.

12. In March 2013, after not receiving the unremitted rental payments and the Tenants' security deposit, the Claimant terminated the Management Agreement.

13. On July 25, 2013, Mr. Koh, on behalf of the Claimant, filed a civil complaint against the Respondent in the District Court for Howard County to recover the unremitted funds.

14. On September 9, 2013, the Commission suspended the Respondent's real estate broker's license. To resolve the Commission's further intended regulatory action against the Respondent for his misappropriation of funds from numerous clients, including the Claimant, on September 24, 2013, the Respondent entered into a Consent Order with the Commission. In that Order, the Respondent agreed, among other things, that he had failed to account for or to remit funds owed to his clients, in violation of section 17-322(b)(22) of the Business Occupations Article, and that he would not participate in any hearing against the Fund arising out of his actions as a property manager with H. T. Brown Real Estate, Inc.

15. The Commission revoked the Respondent's real estate broker's license on September 25, 2013.

16. On October 9, 2013, the Claimant filed her Claim against the Fund for

reimbursement of the amounts improperly retained by the Respondent.

17. On January 27, 2014, the District Court for Howard County issued a default judgment in favor of the Claimant. The District Court awarded the Claimant \$7,850.00, which represented the unremitted rental proceeds and a portion of the Claimant's attorney fees.

18. To date, the Respondent has failed to pay any portion of the default judgment.

19. On December 15, 2014, the Commission assigned its investigator, Jack L. Mull, Jr., to investigate the Claim. That investigation included interviews with the Claimant and the Respondent's former staff and a review of the records maintained by the Claimant and the Respondent.

20. The Tenants continue to remain in possession of the Property.

### **DISCUSSION**

The Respondent consented to revocation of his broker's license for violating section 17-322(b)(22) of the Business Occupations Article, which provides as follows:

**§ 17-322. Denials, reprimands, suspensions, revocations, and penalties –  
Grounds**

....

(b) Grounds. -- 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:

....

(22) fails to account for or to remit promptly any money that comes into the possession of the licensee but belongs to another person. . . .

Claims for reimbursement from the Fund are governed by section 17-404 of the Business Occupations Article, which states, in pertinent part, as follows:

**§ 17-404. Claims against 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;
    - ....
  - (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.
  - ....
- (d) Limitations period. -- A claim under this subtitle shall be submitted to the Commission within 3 years after the claimant discovers or, by the exercise of ordinary diligence, should have discovered the loss or damage.

With respect to claims against the Fund, COMAR 09.11.03.04 further provides as follows:

**.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.

The Claimant bears the burden of proving her entitlement to recover from the Fund.

Business Occupations Article § 17-407(e). It is undisputed that, at all relevant times, the Respondent was a licensed real estate broker and his transactions with the Claimant related to Maryland real estate, fulfilling the requirements of sections 17-404(a)(2)(i) and (ii) of the

Business Occupations Article. To prove entitlement to recovery from the Fund, the Claimant was therefore only required to prove that she incurred an actual loss based on the Respondent's acts or omissions, in which the Respondent obtained money or property by theft, embezzlement, false pretenses, or forgery, or by conduct that constituted fraud or misrepresentation.

Based on the evidence presented, I find that the Respondent embezzled the Claimant's funds.<sup>4</sup> Embezzlement occurs whenever money or other property is entrusted to someone who stands in a fiduciary relationship with the owner and the fiduciary fraudulently and willfully appropriates the property to a use other than that which was intended. *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.") § 2, at 251.

Section 7-113(a) of the Maryland Annotated Code's Criminal Law Article further defines embezzlement as follows:

**§ 7-113. Embezzlement -- Fraudulent misappropriation by fiduciary**

(a) *Prohibited.* -- 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.

Based on the foregoing authority, for the Claimant to establish embezzlement by the Respondent, the Claimant was required to prove, and did prove, that, while serving in a fiduciary capacity, the Respondent lawfully obtained funds from the Tenants on the Claimant's behalf,

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<sup>4</sup> Additionally, section 17-502(b) of the Business Occupations Article provides that "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." *See also* section 17-505(a)(1) of the Business Occupations Article.

and, that while serving in a fiduciary capacity, he misappropriated all or part of those funds with fraudulent intent.

For the following reasons, I conclude that the Claimant has successfully proven that she incurred an actual loss based on the Respondent's acts or omissions, in which he obtained money or property by embezzlement of funds belonging to the Claimant. As the Claimant's agent providing property management services, the Respondent owed a fiduciary obligation to the Claimant,<sup>5</sup> which he admittedly violated when he failed to account for or to tender the funds he was required to manage under the Management Agreement.

The only remaining question is the amount that the Claimant has proven that she is entitled to recover from the Fund as a result of the Respondent's embezzlement. COMAR 09.11.01.18 limits such recovery to the "actual monetary loss" incurred by a claimant. Mr. Mull determined from the records of the Respondent's former company, as explained to Mr. Mull by the Respondent's former associates and as verified by the Claimant's records and the Respondent's bank records, that the Respondent failed to remit to the Claimant \$6,295.64 in rental proceeds. I am persuaded that the Claimant should be awarded this amount.

At the hearing, the Claimant asserted and the Fund's representative agreed that, as a matter of public policy, the Respondent should not be credited a ten percent commission on the rent, received as his management fee, for months when he not only failed to fulfill his duties under the Management Agreement but embezzled funds placed in trust with him pursuant to that agreement. I concur.<sup>6</sup> Mr. Mull calculated that the Respondent withheld \$780.00 as his

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<sup>5</sup> "In accepting employment as an agent, the licensee shall protect and promote the interests of the client. This *obligation of absolute fidelity to the client's interest is primary*, but it does not relieve the licensee from the statutory obligations towards the other parties to the transaction." COMAR 09.11.02.02A (emphasis added).

<sup>6</sup> I allowed the Claimant to amend the Claim so she could seek reimbursement for the funds the Respondent withheld as his ten percent commission.

management fee for the unremitted payments. I am persuaded that the Claimant should also be awarded this amount.

The Claimant contends that she is also entitled to recover from the Fund the amount of the Tenants' security deposit, \$1,800.00. The Claimant will be required to either return this security deposit to the Tenants when they vacate the Property or, if necessary, use these sums to repair the Property when the Tenants vacate. *See* Md. Code Ann., Real Prop. § 8-203(e) and (f) (Supp. 2014). Accordingly, I agree with the Fund's representative that the Claimant should also be awarded this amount.

The Claimant also asserted that she is entitled to recover the \$200.00 Maintenance Reserve. Nevertheless, the Respondent's records indicate that the Maintenance Reserve was depleted by repair costs to a balance of negative twenty dollars. Since the Claimant failed to establish that the \$200.00 Maintenance Reserve was not used by the Respondent to cover expenses for upkeep of the Property, I cannot recommend that this sum be awarded to the Claimant.

Finally, the Claimant argued that she is entitled to recover the \$2,500.00 retainer fee she provided to the Koh Law Firm. The Fund argued that attorney's fees are not an actual loss recoverable from the Fund. I agree. COMAR 09.11.01.18 excludes attorney's fees as an "actual monetary loss" recoverable from the Fund. Thus, I recommend that no attorney's fees be awarded to the Claimant.

Consequently, I find that the Claimant provided proof of an actual loss, calculated as follows:

Past due rental proceeds	\$ 6,295.64
The Respondent's ten percent management fee	780.00
Security deposit	<u>+ 1,800.00</u>
<b>THE CLAIMANT'S ACTUAL MONETARY LOSS</b>	<b>\$ 8,875.64</b>

Because the Claimant has an outstanding judgment in the District Court for Howard County, I recommend that the Fund obtain from the Claimant an Order of Satisfaction of that judgment to avoid the possibility of the Claimant obtaining duplicative recovery for her damages. *See* Md. Rule 3-626.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Proposed Findings of Fact and Discussion, I conclude as a matter of law as follows:

- The Claimant has suffered an actual loss compensable by the Fund due to the Respondent committing acts or omissions involving embezzlement; and
- The Fund should pay the Claimant her actual monetary loss, in the amount of \$8,875.64, for the Respondent's wrongful acts and omissions.
- The Claimants shall provide the Fund an executed Order of Satisfaction of her judgment against the Respondent in the District Court for Howard County in exchange for the Fund's payment of her Claim.

Business Occupations Article §§ 17-322(b)(22) & 404(a)(2); Md. Rule 3-626.

### **PROPOSED ORDER**

**I PROPOSE** that the Maryland Real Estate Commission **ORDER** as follows:

1. The Maryland Real Estate Commission Guaranty Fund shall pay to the Claimant, Philomina A. Chibili, her actual monetary loss, in the amount of \$8,875.64, for the Respondent's wrongful acts and omissions.

2. The Commission's records and publications shall reflect this proposed decision.

May 20, 2015  
Date Decision Issued

MBM/cj  
#156193

**SIGNATURE ON FILE**

Maureen B. Miller  
Administrative Law Judge