

THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION  
V.  
ALAN R. PORTERFIELD  
RESPONDENT  
AND  
CLAIM OF REBECCA ACKS  
AGAINST THE REAL ESTATE  
COMMISSION GUARANTY FUND

\* BEFORE HARRIET C. HELFAND,  
\* ADMINISTRATIVE LAW JUDGE,  
\* OF THE MARYLAND OFFICE OF  
\* ADMINISTRATIVE HEARINGS  
\* OAH No: DLR-REC-24-08-07400  
\* REC CASE NO: 2006-RE-342

\* \* \* \* \*

**PROPOSED ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated November 13, 2008, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 17th day of December, 2008.

ORDERED,

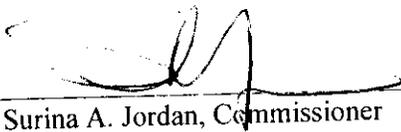
- A. That the Findings of Fact in the Recommended Decision be, and hereby are, AFFIRMED;
- B. That the Conclusions of Law in the Recommended Decision be, and hereby are, APPROVED;
- C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;

and,

D. That the records, files and documents of the Maryland State Real Estate Commission reflect this decision.

MARYLAND STATE REAL ESTATE COMMISSION

12/17/08  
Date

By:   
Surina A. Jordan, Commissioner

MARYLAND REAL ESTATE  
COMMISSION

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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 April 26, 2006, Rebecca Acks (Claimant) filed a complaint (Complaint) with the Maryland Real Estate Commission (REC) and a claim (Claim) against the REC Guaranty Fund (Fund) for reimbursement of losses allegedly caused by the acts and omissions of a licensed real estate agent, Alan R. Porterfield (Respondent), in connection with the Claimant's contract to purchase residential real estate located on Gloria Avenue in Linthicum Heights, Maryland (Property).

On January 29, 2008, the REC filed related charges (Charges) against the Respondent alleging that he violated portions of sections 17-322 and 17-530 of the Business Occupations and Professions Article of the Maryland Annotated Code and Code of Maryland Regulations (COMAR) 09.11.02.02A, the Code of Ethics for individuals licensed by the REC, by allegedly acting as a dual agent in the transaction, failing to have the buyers and sellers sign a Consent for Dual Agency form

and failing to ensure that another agent was assigned to represent one of the parties. Md. Code Ann., Bus. Occ. & Prof. § § 17-322(b)(6), (30) and (33), 17-530(c) and (d)(1)(ii) (2004 & Supp.2008).<sup>1</sup> The REC alleges that the Respondent is subject to sanctions pursuant to section 17-322(c) of the Business Occupations Article.

I held a hearing on September 3, 2008 on the REC's Charges against the Respondent and the Claimant's Claim against the Fund at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Peter Martin, Assistant Attorney General, represented the REC. The Claimant was present and represented herself. The Respondent was present and represented himself. The Fund was not represented at the hearing.<sup>2</sup> Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2004).

Procedure in this case is governed by the provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation (DLLR), and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2008); COMAR 09.01.03 and 28.02.01.

### **ISSUES**

The issues in this case are as follows:

1. Did the Respondent violate sections 17-322(b)(6), (30) and (33), 17-530(c) and (d)(1)(i) of the Business Occupations Article and COMAR 09.11.02.02A?
2. Should the Respondent be sanctioned by a reprimand and a fine of \$1,000.00 pursuant to section 17-322(c) of the Business Occupations Article?
3. Did the Claimant prove that she sustained an actual loss as a result of the Respondent's alleged misconduct?

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<sup>1</sup> Throughout this Decision, the 2004 Replacement Volume and the 2008 Supplement to the Business Occupations and Professions Article will be collectively referred to as the "Business Occupations Article."

<sup>2</sup> At the conclusion of its case, the REC offered a Motion for Judgment, for which I reserved ruling, pending the presentation of the Respondent's case. Pursuant to this decision, that motion was denied.

## SUMMARY OF THE EVIDENCE

### Exhibits

The REC submitted the following exhibits, which were admitted into evidence:

REC Ex. #1 - OAH Notice of Hearing and REC Statement of Charges and Order for Hearing

REC Ex. #2 - REC Certificate of licensing information for Respondent

REC Ex. #3 - REC Report of Investigation, with the following attachments:

- REC Claim Form, received April 26, 2006
- Complaint letter
- Construction Contract from Trustworthy Home Improvement Co.
- Basement Waterproofing Proposal from Nu-Wave Contracting, Inc.
- Letter from David P. Michalski, Broker, received June 6, 2008
- Letter from the Respondent, received May 25, 2006
- Request for Investigation, dated April 23, 2007
- Residential Contract of Sale, dated June 28, 2005
- Home Inspection Report
- Photographs
- Settlement Statement, with attachments, dated September 14, 2005

REC Ex. #4 - Consent for Dual Agent Form

REC Ex. #5 - FHA Financing Addendum, dated June 28, 2005

The Claimant submitted the following exhibit, which was admitted into evidence:

CL Ex. #1 - Proposal from McConkey & Keene, Inc., dated June 5, 2008 (photographs attached)

The Respondent submitted no exhibits for admission into evidence.

### Testimony

The REC presented the testimony of the Claimant and Jack Mull, Investigator for DLLR.

The Claimant testified on behalf of her Fund Claim.

The Respondent testified on his own behalf and presented the testimony of Harry M. Kelly, Inspector for Building Inspection Services, Inc. and Joyce Porterfield.

## FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The REC issued the Respondent Maryland real estate license number 05-5526528 on October 4, 2000. The Respondent was licensed as a real estate salesperson. The Respondent's license has been in effect since that date and, if not renewed, was set to expire on October 5, 2008.

2. The Respondent has no violations on his real estate license.

3. The Respondent was affiliated with Fairfax Realty, Inc. at all times relevant to this matter.

4. During the spring of 2005, the Claimant, who was interested in purchasing a home, located the Property on an internet real estate website and phoned the Respondent, who was the listing agent, to arrange a showing of the Property.

5. When the Claimant and the Respondent met at the Property, the Respondent explained to the Claimant that he represented the sellers and gave her a form which also described the relationships between the parties. This form, entitled, "Understanding Whom Real Estate Agents Represent," was signed by the Claimant on June 28, 2005.

6. After seeing the Property, the Claimant expressed an interest in purchasing the Property. The Respondent prepared an offer of purchase (Contract) and presented it to the sellers, who, on June 28, 2005, accepted it.

7. At the time, the Respondent was supposed to have the Claimant sign a Property Disclaimer Statement (Disclaimer) to present with the Contract, but forgot to do so. When he informed the Claimant, she authorized him to sign her name to the Disclaimer, which he did.

8. The Contract originally prepared by the Respondent indicated that he was acting as a dual agent. This designation was marked by a computer generated "x" next to the notation "dual agent." No Consent for Dual Agency form was prepared or submitted by the Respondent.

9. When the Respondent brought the executed Contract back to his office, he was apprised of the error and, by hand, corrected the Contract by checking off the box noting “seller/landlord agent.” The “x” beside “dual agent” was not removed.

10. Two other areas on the Contract had contradictory agent designations. On the first page of the Contract, the Respondent is checked off by hand as the “seller agent.” However, the block preceding “intra-company agent with broker as dual agent” is blackened. Although there is no indication of a cooperating broker, beneath this notation on the Contract, the box indicating “intra-company agent with broker as dual agent” is preceded with a computer generated “x.”

11. The Respondent gave the Claimant a copy of the executed contract approximately one week following its ratification. He later faxed her another copy of the contract after settlement.

12. Subsequent to the execution of the Contract, the Claimant engaged Harry Kelly, a home inspector recommended by the Respondent, to conduct a home inspection of the Property.

13. On July 11, 2005, Mr. Kelly conducted the home inspection. The Claimant and her boyfriend were present for the home inspection, as were the Respondent and his wife. During most of the home inspection, the Claimant and her boyfriend remained in the living room of the home, conversing with the Respondent and his wife.

14. Following the inspection, Mr. Kelly spoke to the Claimant and Respondent and apprised them of his findings. A few days later, Mr. Kelly delivered a written home inspection report to the Respondent, who called the Claimant to discuss Mr. Kelly’s findings and later delivered to her a copy of the home inspection report.

15. As a result of the home inspection, the Claimant requested that the sellers repair three items in the home. The sellers agreed to all of the items and, with the Claimant, executed a general addendum to the Contract on July 14, 2005. The agreed-to items were: 1) secure the electronic panel in master bedroom closet; 2) install railings at wood deck; and 3) repair ceiling damage in kitchen.

16. According to the Claimant's loan application, another inspection was performed by an inspector sent by the lender.<sup>3</sup> Additional repairs were required by this inspection, all of which were performed by the sellers.

17. A pest inspection of the property revealed termite infestation. The sellers paid to have the house treated for the infestation.

18. The Property's septic tank failed inspection; the sellers paid to have a new septic tank installed.

19. When the Claimant had difficulty financing the Property, the Respondent reduced his commission from the sellers to help adjust the price and the sellers agreed to bear an additional \$6,000.00 of the settlement costs.

20. Settlement on the Property took place on September 14, 2005.

21. The Claimant and her children moved into the home shortly after settlement. After moving in, the Claimant noticed some additional problems with the home, including some termite damaged wood and some water damage.

### **DISCUSSION**

Since the Claimant's Claim against the Fund and the REC's regulatory Charges arose from the same facts and circumstances, I heard them in one proceeding. Accordingly, I considered the evidence presented in this case in determining the merits of both the regulatory Charges and the Fund Claim.

#### Regulatory Charges

The REC, as the moving party on the Charges, has the burden of proving that the Respondent violated the statutory and regulatory sections at issue; the Claimant, as the moving

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<sup>3</sup> The Claimant originally applied for a Community Development Award (CDA) loan (available only to first time buyers), but was disqualified due to her higher level of income and her previous leasehold interest in another property. Settlement was delayed for the Claimant to apply and be approved for the FHA loan, which required a higher down payment.

party on the Claim, has the burden of proving that she suffered an actual loss as the result of the Respondent's misconduct, all by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2004); *Maryland Comm'r of Labor & Industry v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996)(quoting *Bernstein v. Real Estate Comm.*, 221 Md. 221, 231 (1959)).

The REC has charged the Respondent with violating the following sections of its regulatory statute and regulations:

**§ 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:

(6) violates § 17-530(c) or (d) of this title;

...

(30) fails to make the disclosure or provide the consent form required by § 17-530 of this title;

...

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

...

(c) *Penalty.* – (1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding \$5,000.00 for each violation.

**§ 17-530. Disclosure of relationship with lessor or seller...**

(c) *Dual Agents – Generally prohibited.*— Except as otherwise provided in subsection (d) of this section, a licensed real estate broker, licensed associate real estate broker, or licensed real estate salesperson may not act as a dual agent in this State.

(d) *Same – Exception.* – (1)(i) If a licensed real estate broker or a designee of the real estate broker obtains the written informed consent of all parties to a real estate transaction, the real estate broker may act as a dual agent in the transaction.

(ii) When acting as a dual agent in a real estate transaction, a real estate broker or a designee of the real estate broker shall assign a licensed associate real estate broker or licensed real estate salesperson affiliated with the real estate broker to act as the intra-company agent on behalf of the seller or lessor and another licensed real estate salesperson affiliated with the real estate broker to act as the intra-company agent on behalf of the buyer or lessee.

The REC also charged the Respondent with violating the Code of Ethics, COMAR 09.11.02.02A, which provides:

.02 Relations to the Client.

A. 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.

The REC contends that the Respondent violated these provisions by indicating on the contract of sale that he was an intra-company agent acting as agent on behalf of the buyer and the sellers. Additionally, the Respondent is alleged to have prepared an agency disclosure form indicating that he was working as a dual agent and did act as a dual agent in the transaction. The REC further claims that the Respondent failed to have the buyer and sellers sign a Consent to Dual Agency form and failed to ensure that another agent was assigned to represent one of the parties and that his representation of both the buyer and sellers was improper.

Although the Respondent may not have intended his actions to have been interpreted by the Claimant as a representation of her interests, his efforts during the contractual period did not completely disabuse her of that notion. The Respondent admitted that he did want to assist her, which in itself, was considerate. However, despite the Respondent's acknowledgement that he erred in not correcting the contract, he is nonetheless responsible for its terms. Regardless of the impression he may or may not have given to the Claimant about his status, the ambiguity of the contract regarding dual agency suggested that he was acting as a dual agent, without following the proper procedures to do so, including the execution of a Consent to Dual Agency form.

I do not, however, find that the Respondent acted in any way to deliberately mislead the Claimant. I found his testimony earnest and credible in describing his drawing her attention to his status as seller's agent, while still attempting to assist her in purchasing the home. Because he was the only agent involved in the transaction, he felt responsible for facilitating the consummation of the sale. In doing so, he assisted the Claimant, both in helping to arrange a home inspection and securing financing. While he was not legally acting as her agent, his efforts, combined with the ambiguity that remained in the body of the contract, may have led her to confuse his role.<sup>4</sup> I therefore find that by failing to remove the designations of dual agency from the contract, or if intending to act as a dual agent, failing to provide a Consent to Dual Agency form, the Respondent violated sections 17-322 and 17-530 of the Business Occupations Article and COMAR 09.11.02.02A.

#### The Appropriate Regulatory Sanction

The purpose of the regulatory statute is "to protect the public in its dealings with real estate brokers, to place a duty of good faith and fair dealing on real estate brokers." *Gross v. Sussex Inc.*, 332 Md. 247, 274 (1993). In addition to allowing for suspension, revocation or reprimand of a real estate agent, section 17-322 allows the REC to impose a financial penalty, not exceeding \$5,000.00, for each statutory violation. The REC suggested that I consider a reprimand and a \$1,000.00 fine. Section 17-322 directs me to consider the seriousness of the violation; the harm caused by the violation, the Respondent's good faith, and any previous violations in determining the appropriate penalty.

Noting the Respondent's record, I find the Respondent has no previous violations on his real estate license. Even though the Respondent's actions may have been due to a lack of

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<sup>4</sup> Although the Claimant asserted that the Respondent signed the Disclaimer without her consent, I found the Respondent's version more believable; however, this does not negate the impropriety of signing another's name to a document, without notation, even if permitted to do so.

attention to detail or a failure to understand the implications or requirements of dual agency, without any intent to defraud or mislead, the Respondent erred in unambiguously performing his role as a seller's agent in the transaction. On the other hand, the Respondent showed considerable good faith by reducing his commission to facilitate the sale of the property. Considering all the factors set forth in section 17-322(c), I recommend reprimand of the Respondent with no civil penalty.

### The Guaranty Fund Claim

The Claimant bears the burden of proof in her Claim against the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e)(2004). For the reasons set forth below, I conclude that the Claimant has not met her burden on a portion of the claim.

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) *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...

(ii) involve 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.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (2004).

COMAR 09.11.03.04 further provides with respect to claims against the Fund as follows.

A. A Guaranty Fund claim shall be based on the alleged misconduct of a licensee.

B. For the purposes 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.

In her Claim, the Claimant sought reimbursement for \$19,400.00 worth of defects she allegedly discovered after she moved into her home. She partially bases her Claim on the assertion that she was unaware that she was purchasing the home “as is” and was somehow prevented from accompanying Mr. Kelly when he conducted the home inspection of the property. The Claimant also accused the Respondent and the sellers of concealing defects by the placement of furniture. However, the Claimant was unable to substantiate these assertions with evidence.<sup>5</sup> While I understand that the Claimant may be unhappy with some of the problems she later discovered in the Property, she failed to prove that the Respondent had any role in either creating or concealing these purported defects.

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<sup>5</sup> Mr. Kelly credibly testified that during the home inspection, which occurred on an extremely hot day, he encouraged the Claimant to accompany him during his inspection of the exterior of the home, but she preferred to remain in the air conditioned living room. Mr. Kelly additionally noted that when he informed her of some problems regarding the lower level and crawl space, the Claimant indicated that she was unconcerned because her brother was a contractor and could help her with any necessary repairs. Mr. Kelly also offered that he noticed the Claimant’s interest in commercial development on the corner and her hope that its presence would raise the value of the Property.

The Claimant had every right and opportunity to accompany Mr. Kelly during the entirety of the inspection. She chose to remain in the living room, and despite her claim of conspiracy, offered no evidence that she was dissuaded or barred from joining Mr. Kelly. In fact, items listed as problems in the home inspection report were corrected by the sellers at their expense. As noted, when the Claimant's original loan plans fell through, the Respondent adjusted his commission in order to assist the Claimant and lower her costs in purchasing the home.

Section 17-401(b)(1) of the Business Occupations Article provides that "[t]he Commission may order payment by the Guaranty Fund only for the actual monetary loss suffered by the claimant as a result of the claim proven by the claimant." The term "actual loss" is not defined in the statute, regulation or any reported appellate decision. Interpreting it in the context of the statute, it means an economic loss suffered by the Claimant as a result of proven misconduct by the Respondent. I conclude that the Respondent cannot be held responsible for any defects found subsequent to the Claimant's purchase of the property. The Claimant engaged a home inspector; the sellers, as well as the Respondent, adjusted the costs of purchasing the home as a result of items cited in the home inspection that needed repair, as well as in response to the Claimant's financial difficulties. That the Claimant may have experienced buyer's remorse due to her dissatisfaction related to her expectations of elevated real estate values is no reflection on the Respondent's efforts in facilitating the sale. To the contrary, the Respondent exercised both care and forbearance by his accommodations and actions to allow settlement to occur in a timely fashion. Accordingly, I find that the Claimant has not met her burden to prove that she suffered an actual monetary loss as a result of her claim against the Respondent.

#### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Respondent violated sections 17-322(b)(6), (30) and (33), 17-530(c), and 17-530(d)(1)(i) of

the Business Occupations and Professions Article and the Code of Ethics by failing to correct the contract to reflect his sole role as the agent for the seller in the sale of the Property. Md. Code Ann., Bus. Occ. & Prof. § § 17-322(b)(6), (30) and (33); 17-530(d)(1)(i) (2004 & Supp. 2008); COMAR 09.11.02.02A. I further find that the Claimant is not entitled to payment from the Real Estate Guaranty Fund because she has shown no actual monetary loss as a result of any alleged misconduct by the Respondent. Md. Code Ann., Bus. Occ. & Prof. § 17-404 (2004).

**RECOMMENDED ORDER**

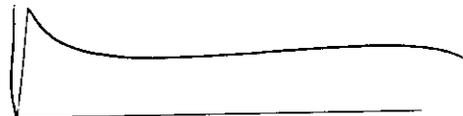
**I RECOMMEND** that the Maryland Real Estate Commission:

**ORDER** that Respondent be reprimanded;

**ORDER** that the Claimant's claim be **DENIED**; and

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

November 13, 2008  
Date Decision Mailed



Harriet C. Helfand  
Administrative Law Judge

#99573

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