

**BEFORE THE MARYLAND REAL ESTATE COMMISSION**

**MARYLAND REAL ESTATE  
COMMISSION**

\*

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v.

\* **CASE NO. 2008-RE-049**

**IBRAHIM JALLOH  
Respondent**

\* **OAH NO. DLR-REC-24-09-34612**

**And**

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**CLAIM OF ALICE GASSAMA  
AGAINST THE MARYLAND  
REAL ESTATE GUARANTY FUND**

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**OPINION AND FINAL ORDER**

This matter came before the Commission on argument on Exceptions filed by the Respondent, Ibrahim Jalloh, and the Claimant, Alice Gassama, to the Proposed Order of November 17, 2010. On September 27, 2010, Administrative Law Judge Charles R. Boutin (“ALJ”) filed a Proposed Decision and Recommended Order in which he recommended that the Respondent be found to have violated Md. Code Ann., Business Occupations & Professions Article (“Bus. Occ. & Prof.”). §§ 17-322(b)(3), (25), (32) and (33); 17-530 (b)(1) & (4); and 17-532(c)(iv) & (vi), as well as Code of Maryland Regulations (“COMAR”) 09.11.02.01C. and H. and COMAR 09.11.02.02(1); that the Respondent’s real estate salesperson’s license be revoked; that the Respondent pay a civil penalty of \$5,000.00; and that the Claimant’s Maryland Real Estate Guaranty Fund (“Fund”) claim against the Respondent be dismissed.

On November 17, 2010, the Commission issued a Proposed Order that adopted the ALJ’s Findings of Fact and amended the ALJ’s Conclusions of Law as follows: That

the Respondent violated Md. Code Ann., Bus. Occ. & Prof., §§ 17-322(b)(6) and (33), 17-530(d)(1)(i) and (ii), 17-532(c), and COMAR 09.11.02.02A; that all real estate licenses held by the Respondent, Ibrahim Jalloh, are suspended for six months; that the Respondent be assessed a civil penalty in the amount of \$5,000.00; and that the claim of Alice Gassama against the Maryland Real Estate Guaranty Fund is denied. The Commission amended the ALJ's Conclusions of Law to reflect the charges filed against the Respondent and to delete the additional charges added by the ALJ. The Commission also reduced the penalty recommended by the ALJ because it felt the penalty recommended was excessive for the violations that were charged and proven.

A hearing, on the Exceptions filed by the Respondent and Claimant, was held by a panel of Commissioners, consisting of Commissioners Anne S. Cooke, Robin L. Pirtle, and Georgiana S. Tyler on May 18, 2011. Jessica Berman Kaufman, Assistant Attorney General, represented the Commission. Jeneba Jalloh Ghatt, Esquire represented the Respondent and Jeffrey M. Ford, Esquire represented the Claimant. The Respondent was present for the hearing. The Claimant did not appear for the hearing. A transcript of the hearing before the ALJ was not provided to the Commission. The proceedings were electronically recorded.

#### **SUMMARY OF THE EVIDENCE**

On behalf of the Commission, six exhibits as well as the Office of Administrative Hearings' folder containing the exhibits which were introduced at the hearing before the ALJ, were entered into evidence.

#### **FINDINGS OF FACT**

The Commission adopts the Findings of Fact recommended by the ALJ.

## DISCUSSION

The Respondent was a licensed real estate salesperson at all times relevant to this case. FF 1<sup>1</sup>. The Respondent was the listing agent for a home located at 3803 Aisquith Court, Springdale, Maryland 20774 (“the Home”). FF 2, 6. The Claimant contacted the Respondent when she was ready to purchase a home and was shown several homes by the Respondent. FF 2, 3. The Respondent admitted that he failed to notify the Claimant that he was acting as a dual agent in the transaction. FF 5, 9. The Claimant was the sole purchaser of the Home; however, during a visit to the Home, with the Claimant, prior to its purchase, the Claimant’s husband stated that he thought there was evidence of flood damage. FF 7. The Claimant testified that when she asked the Respondent whether she needed a home inspection, he told her that it would be a waste of money because the house was virtually new. FF 8. According to the property listing, the house was eight years old. The Claimant did not read the purchase documents before she signed them and the Respondent did not explain the contents of the documents to the Claimant. FF 12, 13. The Claimant’s first language is not English and she does not read English very well. FF 14. The Claimant and the Respondent communicated in the “Krio” language when they talked and, therefore, there was no language barrier. FF 15. The Claimant moved into the Home in December, 2005 and, in September, 2006, the Home flooded. FF 16, 17. The Claimant’s insurance company paid a total of \$40, 118.00 in damage claims from the flooding and the Claimant personally paid \$11,500.00 for flood damage repairs to the Home. FF 18, 19.

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<sup>1</sup> “FF” refers to the ALJ’s Findings of Fact.

Counsel for the Respondent alleged at the Exceptions' hearing that the penalty imposed by the Commission in the Proposed Order was excessive because the Claimant failed to prove misrepresentation or fraud on the part of the Respondent. She contended that while there were some omissions on the part of the Respondent in regard to the information he should have given to the Claimant, the omissions stemmed from negligence, not misrepresentation or fraud.

Counsel for the Claimant argued that there is no bigger misrepresentation than for a real estate salesperson to tell a potential buyer that they are representing the buyer when the salesperson is already representing the seller and is, therefore, not objectively representing the potential buyer. He contended that the Respondent took advantage of an unsophisticated buyer by not informing her of the importance and function of a home inspection prior to purchase and the Respondent thus allowed the seller to have an unfair advantage in the transaction. Mr. Ford further argued that if the Respondent had complied with the law regarding dual agency, the Claimant would have had the benefit of representation by a salesperson who, acting in the interest of the Claimant, would have advised her to obtain a home inspection.

The Respondent admitted that he should have notified the Claimant that he was acting in a dual capacity. Instead of complying with the legal requirements of dual agency, which require the broker or the broker's designee to be the dual agent and to appoint intra-company agents to represent each of the parties, the Respondent represented both the seller and the buyer with no involvement by his broker. The Respondent's failure to inform the Claimant that he was acting in a dual capacity and failure to inform

the Claimant of her rights to separate representation constitutes a violation of Md. Code Ann., Bus. Occ. & Prof., § 17-530 (d)(1)(i) and (ii) which provides:

**§17-530**

...

(c) 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) (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 intracompany agent on behalf of the seller or lessor and another licensed associate real estate broker or licensed real estate salesperson affiliated with the real estate broker to act as the intracompany agent on behalf of the buyer or lessee.

The violation of Md. Code Ann., Bus. Occ. & Prof., § 17-530(d)(1)(i) and (ii) also constitutes a violation of Md. Code Ann., Bus. Occ. & Prof., § 17-322(b)(6).

The Respondent also violated the provisions of Md. Code Ann., Bus. Occ. & Prof., § 17-532(c)(1)(iv) and COMAR 09.11.02.02A. which require a licensee to treat all parties to the transaction honestly and fairly and answer all questions truthfully as well as to protect and promote the interests of his client. According to the property listing, the Home was eight years old. Nonetheless, the Complainant testified that when she asked the Respondent whether she should arrange for an inspection of the Home, the Respondent informed her that to do so would be a waste of money because the Home was virtually new. The Respondent made a willful misrepresentation of the age of the Home and the Complainant relied upon that misrepresentation to her detriment. If the Claimant had

independent representation in the transaction, that agent would likely have advised her to obtain an inspection of the Home. The Respondent's violation of COMAR 09.11.02.02A also constitutes a violation of Md. Code Ann., Bus. Occ. & Prof., § 17-322(b)(33).

Instead of or in addition to reprimanding, suspending or revoking a real estate license for his or her violation of the above statutes and regulations, Md. Code Ann., Bus. Occ. & Prof., § 17-322(c) permits the assessment of up to a \$5,000.00 penalty 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.

The Commission finds that the violations in this case are serious ones which go to the heart of the agency relationship. Recognizing that a dual agency relationship may be problematic, the law restricts the circumstances under which it may occur. The broker or the broker's designee must be involved and there must be separate intra-company agents for the buyer and the seller. The reasons for this statutory requirement are obvious: The interests of the buyer and the seller are different. In this case, the Claimant was led, to her detriment, to mistakenly believe that the Respondent was protecting her interests. If the Respondent had complied with the requirements of dual agency, the Claimant would have been represented by a different agent who could have protected her interests in regard to providing her with accurate information regarding the age of the Home and the benefits of having an inspection performed on the Home.

The Commission further finds that due to the Respondent's failure to comply with dual agency requirements and his misrepresentation regarding the age of the Home and the feasibility of performing an inspection of the Home, the Claimant purchased a home which was subject to flooding, ultimately resulting in the Claimant being required to pay \$11,500.00 for flood repairs to the Home. Thus, significant harm was caused by the Respondent's violations.

The Commission notes that the ALJ, who heard and observed the Respondent's testimony, found that "...he had a serious lack of credibility; he was evasive and could not remember many clerical mistakes. In addition, when he was asked questions that the answer to which may have been harmful to him, he 'could not recall'." The Commission accepts the ALJ's findings as substantiation of the Respondent's lack of good faith.

The Respondent has had no previous statutory or regulatory violations.

Based upon an evaluation of the criteria noted above, the Commission concludes that a six-month license suspension and a \$5,000.00 civil penalty are the appropriate sanctions.

Md. Code Ann., Bus. Occ. & Prof., § 17-404 governs claims brought against the Maryland Real Estate Guaranty Fund and sets forth the following criteria that must be established by a claimant in order to obtain an award from the Fund:

**§ 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:

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.

**COMAR 09.11.03.04** provides the following:

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 pretenses, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit;
- (2) Is performed by an unlicensed employee of a licensed real estate broker or by a duly licensed real estate broker, associated 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 Respondent was a licensed real estate salesperson at all times relevant to this matter. The Respondent's activities, as the licensed real estate salesperson representing the Claimant in the purchase of real property in Maryland, fall within the definition of providing real estate brokerage services set forth in Md. Code Ann., Bus. Occ. & Prof. 17-101(l)(1), (2), and (3), to wit:



“(1) “Provide real estate brokerage services” means 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; ...”

The acts and omission of the Respondent, a licensed real estate salesperson, which are complained of by the Claimant, relate to real estate located in Maryland. Thus, the requirements of Md. Code Ann., Bus. Occ. & Prof., § 17-404(a)(2)(i), (ii), and (iii) have been met.

Finally, the Commission concludes that the Respondent’s failure to disclose to the Claimant that he was acting as a dual agent constituted a misrepresentation by the Respondent that he was acting solely in her interest in the transaction. The Complainant relied upon the Respondent’s misrepresentation of his dual role in the transaction as well as his misrepresentation regarding the age of the Home and the feasibility of an inspection of the Home to her detriment.

COMAR 09.11.01.18 provides that the amount of compensation recoverable by a claimant who meets the criteria for an award from the Fund is the “actual monetary loss incurred by the claimant”. In this case, the Commission concludes, based on the ALJ’s Findings of Fact, that the Claimant sustained an actual monetary loss for flood repairs to the Home in the amount of \$11,500.00.

### CONCLUSIONS OF LAW

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

1. The Respondent, Ibrahim Jalloh, violated Md. Code Ann., Bus. Occ. & Prof., §§ 17-322(b)(6) and (33); § 17-530(d)(1)(i) and (ii); § 17-532(c)(1)(iv); and COMAR 09.11.02.02A;

2. The Respondent, Ibrahim Jalloh, was a licensed real estate salesperson at all times relevant to this matter.

3. The Claimant, Alice Gassama, suffered an "actual loss", in the amount of \$11,500.00 due to the misrepresentations of the Respondent, Ibrahim Jalloh, a licensed real estate salesperson, during the course of the provision of real estate brokerage services related to Maryland real estate; and

4. The Claimant, Alice Gassama, is entitled to compensation, in the amount of \$11,500.00 from the Maryland Real Estate Commission Guaranty Fund for actual losses sustained as a result of the actions of the Respondent, Ibrahim Jalloh.

### ORDER

The Exceptions of the Respondent, Ibrahim Jalloh, and the Claimant, Alice Gassama, having been considered, it is this 10<sup>th</sup> day of August, 2011, by the Maryland Real Estate Commission, **ORDERED:**

1. That the Respondent, Ibrahim Jalloh, violated Md. Code Ann., Bus. Occ. & Prof., §§ 17-322(b)(6) and (33); § 17-530(d)(1)(i) and (ii); §§§§ 17-532(c)(1)(iv); and COMAR 09.11.02.02A;

2. That all real estate licenses held by the Respondent, Ibrahim Jalloh, are suspended for six months;

3. That the Respondent, Ibrahim Jalloh, is 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 all real estate licenses held by the Respondent, Ibrahim Jalloh, are suspended until the civil penalty is paid, and that this suspension is in addition to, and not in lieu of, the six-month disciplinary suspension;

5. That the Claimant, Alice Gassama, be reimbursed in the amount of Eleven Thousand Five Hundred Dollars (\$11,500.00) from the Maryland Real Estate Commission Guaranty Fund to compensate for the actual losses sustained by the Claimant due to the conduct of the Respondent, Ibrahim Jalloh;

6. That the Respondent, Ibrahim Jalloh, shall be ineligible to hold any real estate license issued by the Maryland Real Estate Commission until the Maryland Real Estate Commission Guaranty Fund is reimbursed Eleven Thousand Five Hundred Dollars (\$11,500.00) plus annual interest of ten percent (10%) pursuant to Md. Ann. Code, Bus. Occ. & Prof., §§ 17-411(a) and 17-412; and

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

**MARYLAND REAL ESTATE COMMISSION**

**SIGNATURE ON FILE**

**By:** \_\_\_\_\_

**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.

|                             |                                   |
|-----------------------------|-----------------------------------|
| MARYLAND REAL ESTATE        | * BEFORE CHARLES R. BOUTIN.,      |
| COMMISSION                  | * AN ADMINISTRATIVE LAW JUDGE     |
| v.                          | * OF THE MARYLAND OFFICE          |
| IBRAHIM JALLOH, RESPONDENT, | * OF ADMINISTRATIVE HEARINGS      |
| AND                         | * OAH NO. : DLR-REC-24-09-34612 . |
| CLAIM OF ALICE GASSAMA      | * MREC NO. : 2008-RE-049          |
| AGAINST THE MARYLAND REAL   | *                                 |
| ESTATE COMMISSION GUARANTY  | *                                 |
| FUND                        | *                                 |

\* \* \* \* \*

**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On July 14, 2007, Alice Gassama (Claimant) filed a complaint with the Maryland Real Estate Commission (REC) and a claim against the REC Guaranty Fund (Fund). The claim was for losses allegedly caused as a result of the conduct of the Respondent Salesperson, Ibrahim Jalloh.

On August 21, 2009, the REC filed a Statement of Charges and Order for Hearing against the Respondent, alleging violations of sections 17-322(b)(6), 17-530(d)(1) (i) and (ii), 17-532(c)(1)(iv) of the Maryland Real Estate Brokers Act (the Act) as well as a violation of the REC

Code of Ethics, Code of Maryland Regulations (COMAR) 09.11.02.01C and 09.11.02.02D. Md. Code Ann., Bus. Occ. & Prof. §§ 17-322, 17-530, and 17-532 (Supp. 2010).

I held a hearing on July 1, 2010, on the claim and charges, at the Office of Administrative Hearings (OAH), Hunt Valley, Maryland. Assistant Attorney General Peter Martin represented the REC. The Claimant was represented by Jeffrey Ford, Esquire. The Respondent represented himself. Christopher King, Assistant Attorney General, represented the Fund.

The case was heard pursuant to sections 17-324 and 17-408 of the Act. Procedure is governed by the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009; COMAR 09.01.03 and 28.02.01).

### **ISSUES**

1. Did the Respondent violate the Act and/or the REC Code of Ethics, and if so, what is the appropriate sanction?
2. Did the Claimant sustain an actual loss as a result of misconduct by the Respondent, and if so, what is the amount of that loss?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following documents offered on behalf of the REC:

REC Ex. # 1 - Notice of Hearing, dated March 16, 2010, including Statement of Charges and Order for hearing

REC Ex. # 2 - Notice of Hearing, dated April 12, 2010, including Statement of Charges and Order for hearing

REC Ex. # 3 - REC Registration History for Respondent

REC Ex. # 4 - REC Report of Investigation closed March 23, 2009, by Jennifer Grimes, with attachments

REC Ex. # 5 - Supplemental REC Report of Investigation closed March 23, 2009, by Jennifer Grimes, with attachments

I admitted the following documents offered on behalf of the Claimant:

CLT Ex. # 1 – ASAP Waterproofing Proposal, dated October 2, 2008.

CLT Ex. # 2 – Copy of check #1481, dated October 11, 2006, with attachment.

The Respondent did not offer any exhibits.

### Witnesses

The REC presented testimony from the Claimant, Alice Gassama; and Jennifer Grimes, the REC investigator. The Claimant did not present any additional testimony. The Respondent testified on his own behalf. The Fund did not present any witnesses.

### **FINDINGS OF FACT**

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

1. At all times relevant to this case, the Respondent was a licensed real estate salesperson.
2. The Respondent was the listing agent for the home. The Claimant contacted the Respondent when she was ready to purchase a home.
3. The Respondent took the Claimant to several homes to consider.
4. The Claimant was the sole purchaser of the home and her husband was not a party to the contract.
5. The Respondent acted as a dual agent in this transaction.
6. The home was located at 3803 Aisquith Court, Springdale, Maryland 20774.
7. During a visit to the home, the Claimant's husband stated he thought there was evidence of flood damage.

8. The Respondent told the Claimant that the house was new and did not need an inspection.
9. The Respondent admitted it was a mistake to not disclose to the Claimant that he was acting in a dual capacity.
10. The Claimant went to Long and Foster to sign the documents.
11. The Respondent brought some papers to the Claimant's workplace where she signed some of them in his truck.
12. The Claimant she did not read the documents before she signed them.
13. The Respondent did not explain the documents to the Claimant.
14. The Claimant's first language is not English and she does not read it very well.
15. The Claimant and the Respondent communicated in the "Krio" language when they talked, therefore, there was no language barrier.
16. The Claimant moved in to the house in December 2005.
17. The house flooded in September 2006.
18. The Claimant's insurance company paid \$40,118.00 in damage claims from flooding.
19. The Claimant paid \$11,500.00 out her own pocket in flood repairs to the home.

### DISCUSSION

The Commission has charged the Respondent under the following provisions of Business

Occupations Article § 17-322:

**§ 17-322. Denials, reprimands, suspensions, revocation, 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 licensee if the applicant or licensee:

- ....
- (6) Violates 17-530 (c) or (d) of this title;



The Commission also charged the Respondent with violation of the following provisions of Business Occupations Article § 17-530:

**§ 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 intracompany agent on behalf of the seller or lessor and another licensed associate real estate broker or licensed real estate salesperson affiliated with the real estate broker to act as the intracompany agent on behalf of the buyer or lessee.

The Respondent acknowledges that he violated Business Occupations § 17-530, which also constitutes a violation of Business Occupations Article § 17-322(b)(32). In response to inquiry at the hearing regarding his failure to go to his broker and arrange for another agent to act for the Buyer, the Respondent admitted having failed to do so and stated, "I made a mistake." By acting as a dual agent in this transaction, the Respondent violated COMAR 09.11.02.02A because he could not and did not, simultaneously, maintain absolute fidelity to both the Seller and the Buyer.

The Respondent denies knowledge of any of the Property defects. The Commission presented sufficient evidence to convince me that the Respondent made a *willful* misrepresentation, i.e., fraud, in violation of Business Occupations Article § 17-322(b)(3). When a person intentionally misrepresents a material fact or produces a false impression in order to

mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, there is positive fraud. *McKeever v. Washington Heights Realty Corp.*, 183 Md. 216, 37 A.2d 305 (1944). Fraud also may consist of a suppression of the truth. The concealment becomes a fraud where it is affected by misleading and deceptive talk, acts, or conduct, or is accompanied by misrepresentations. *Schnader v. Brooks*, 150 Md. 52, 132 A. 381 (1926). The concealment must have been intentional and effective, that is, the hiding of a material fact with the attained objective of creating or continuing a false impression as to that fact; the affirmative suppression of the truth must have been with intent to deceive. *Fegas v. Sherrill*, 218 Md. 472, 147 A.2d 223 (1958). I find the Respondent failed to meet his professional responsibilities in this case. He did not inform the Claimant of the importance of a home inspection and the hidden problems it might disclose.

Business Occupations Article §§ 17-322(b)(4) COMAR 09.11.02.01D both refer to a licensee's obligation to disclose "material facts," which have been defined as follows:

The matter is material if (a) a reasonable man would attach importance to its existence or non-existence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

Restatement (Second) of Torts, § 538 (1977), *quoted in Ward Dev. Co. v. Ingrao*, 63 Md. App. 645, 655, 493 A.2d 421, 426 (1985); *Brodsky v. Hull*, 196 Md. 509, 515-516, 77 A.2d 156, 159 (1950). See also *Buffington v. Wentz*, 228 Md. 33, 38, 178 A.2d 417, 420 (1962) and *Virginia Real Estate Comm'n v. Bias*, 226 Va. 264, 269-70, 308 S.E. 2d 123, 125-6 (Va. 1983).

Any reasonable person would find material most, if not all, of the Property defects the Buyer discovered after settlement, such as the condition of the stove and the refrigerator. Even if the

Respondent did not know about the specific defects, he nevertheless violated COMAR 09.11.02.01D, by failing to make a reasonable effort to ascertain such material facts, to avoid the Seller's concealment of those defects from the Buyer prior to settlement. The Respondent similarly violated Business Occupations Article § 17-322(b)(4), by negligently failing to disclose to the Buyer "material facts" that the Respondent (as listing *and* selling agent) *should* have known.

In *Lewis v. Long & Foster Real Estate, Inc.*, 85 Md. App. 754, 761, 584 A.2d 1325, 1329, *cert. denied*, 323 Md. 34, 591 A.2d 250 (1991), the Maryland Court of Special Appeals stated that "a real estate broker has no duty to investigate and report on defects which might exist in property." *Id.* That duty changes, however, when the parties are not conducting an arm's length transaction. When a relationship of trust and confidence exists or when specific questions are asked concerning some aspect of a transaction, a duty of disclosure arises. *Fegeas v. Sherrill*, 218 Md. 472, 479, 147 A.2d 223, 227(1958). In light of the dual agency here, a special relationship clearly existed between the Respondent and the Claimant in this case.

Consequently, when the Claimant asked the Respondent whether she needed an inspection, the Respondent inappropriately and irresponsibly told the Claimant that it would be a waste of money, that the home was virtually new, leading her to believe that it was not necessary.

Pursuant to COMAR 09.11.02.01D and Business Occupations Article § 17-322(b)(4), the Respondent still had an obligation to obtain all material information regarding the Property's defects and to convey that information to the Buyer.

For the same reasons, I conclude that the Respondent violated COMAR 09.11.02.01C, by engaging in conduct that demonstrated bad faith, incompetence and untrustworthiness, as well as improper dealings, in violation of Business Occupations Article § 17-322(b)(25). I find the

Respondent's lack of knowledge to be overwhelming. I find that the Respondent lacked credibility, was evasive in his testimony, could not recall many facts when an answer could have harmed him and made many clerical mistakes. Moreover, the Respondent's conduct failed to protect the public against misrepresentation and unethical practices in the real estate field and could be damaging to the public and to the dignity and integrity of the real estate profession, also in violation of COMAR 09.11.02.01C.

As indicated in my discussion I do not believe the Respondent's assertion to the Commission's inspector that he explained to the Claimant the importance of having a home inspection. Unlike the Respondent, the Claimant's testimony at the hearing was consistent. The Respondent failed to explain to the Buyer that the inspection clause in the contract (which the Respondent inappropriately influenced the Claimant to waive) would have allowed her to obtain an itemized list of property defects from a private inspector. The Respondent was evasive throughout his testimony. I did not find him truthful.

### **Regulatory Sanctions/Penalties**

Instead of or in addition to reprimanding, suspending or revoking a real estate licensee for his or her violation of the above statutes and regulations, Section 17-322(c) of the Business Occupations Article permits assessment of up to a \$5,000.00 monetary penalty,<sup>1</sup> per violation, applying the following criteria:

(c) Penalty.

.....

(2) To determine the amount of the penalty imposed under this subsection, the Commission shall consider:

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<sup>1</sup> Business Occupations Article 17-322(c)(3) provides that the Commission "shall pay any penalty collected under this subsection into the General Fund of the State."

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee.

The Respondent has had no previous statutory or regulatory violations. I do not believe he acted in good faith in the subject transaction. Throughout his testimony, I found he had a serious lack of credibility; he was evasive and could not remember many clerical mistakes. In addition, when he was asked questions that the answer to which may have been harmful to him, he “could not recall.” It is important that the Commission sanction the Respondent, at the very least, for his failure to fully explain and properly advise the Buyer concerning the effects of her waiving the inspection clause in the contract. Under these circumstances, I believe revocation of the Respondent’s license and a total monetary penalty of \$5,000.00 will appropriately address the Respondent’s violation.

I will deny the Claimant’s clam against the Real Estate Guaranty Fund. When she looked at the property her husband commented that there was evidence of some prior flooding. She knew she had a right to have a home inspection, but she elected not to get one. Even though the Respondent assured her that the home was almost new and she did not need one, she still had the opportunity to have the inspection completed. This would have turned up the prior damage and given her the opportunity to withdraw from the contract, or require repairs to be made before closing. The Claimant’s loss is not connected to any misrepresentation to her. It was the result of her negligence in not getting a home inspection that would have uncovered the problem.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Respondent violated the Business Occupations and Professions Article, sections 17-322(b)(3), (25), (32) & (33); 17-530(b)(1) & (4); 17-532 (c)(iv) & (vi), as well as COMAR 09.11.02.01C & .01H and COMAR 09.11.02.02(1).

I further conclude that the Respondent is subject to his license being revoked and that he be subject to \$5,000.00 in civil penalties for the said violations of the Maryland Real Estate Brokers Act. Md. Code Ann., Bus. Occ. & Prof. § 17-322(b) and (c)(1) (2010).

Finally, I conclude that the Claimant is not entitled to payment from the Maryland Real Estate Commission Guaranty Fund. Md. Code Ann., Bus. Occ. & Prof. §§ 17-401 through 17-412 (2009).

### **RECOMMENDED ORDER**

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

**ORDER** that the Respondent violated the Maryland Business Occupations and Professions Article, sections 17-322, 530 & 532, as well as COMAR 09.11.02.01C & .01H and COMAR 09.11.02.02(1);


**ORDER** that the Respondent's Real Estate broker's License be revoked. Md. Code Ann., Bus. & Occ. Prof. § 17-322(b)(6) (2010);

**ORDER** that the Respondent be subject to \$5,000.00 in civil penalties. Md. Code Ann., Bus. & Occ. Prof. § 17-322(c)(1) (2010);

**ORDER** that the Claimant's Guaranty Fund claim against the Respondent be dismissed. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404(a)(2); 407(e), 410(b)(1) (2010); and

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

September 27, 2010  
Date Decision Mailed

SIGNATURE ON FILE  
  
Charles R. Boutin  
Administrative Law Judge

DOC #116753