

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *
v. *
DION RAINEY * CASE NO. 2011-RE-440
Respondent *
And * OAH NO. DLR-REC-24-13-21109
CLAIM OF FREDDIE JONES *
AGAINST THE MARYLAND *
REAL ESTATE GUARANTY FUND *
* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated April 23, 2014, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 18th day of June, 2014,

ORDERED,

A. That the Findings of Fact in the recommended decision be, and hereby are, AMENDED as follows:

7. REC Exhibit #9 reflects a final decision of the Real Estate Commission in Case No. 2004-RE-053, in which Dion Rainey was reprimanded and fined \$1,000 for violation of Bus. Occ. And Prof. Art., §17-322(b)(4), (25), (32), and (33) and COMAR 09:11.02.01C and D.

B. That the Conclusions of Law in the recommended decision be, and hereby are, ADOPTED;

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

1. The Respondent Dion Rainey violated Bus. Occ. And Prof. Art., §17-322(b)(4), (25), (32), and (33), and COMAR 09.11.02.01C and 09.11.02.02A;

2. All real estate licenses held by the Respondent Dion Rainey be, and hereby are, REVOKED;

3. The Respondent Dion Rainey shall pay to the Real Estate Commission a civil penalty in the amount of \$5,000.00 within 30 days of the date of this Proposed Order;

4. The Claim of Freddie Jones against the Real Estate Guaranty Fund is DENIED;

5. The records and publications of the Real Estate Commission shall reflect this final decision.

D. Pursuant to State Govt. Article, §10-220, the Commission has added Finding of Fact 7, which reflects the prior decision of the Commission in Case No. 2004-RE-053, REC Exhibit #9 in the case. The ALJ failed to mention this decision in her discussion and specifically failed to include it in her analysis of the appropriate penalty to be imposed on the Respondent. She did not mention the fourth factor set forth in §17-322(c), "any history of previous violations by the licensee." While consideration simply confirms the appropriateness of the ALJ's recommendation of the sanction of revocation of the license and imposition of a \$5,000 civil penalty, it is important that this Proposed Order recognize the inclusion in the record of the prior disciplinary action.

The Commission has also added the 30-day time period in which the penalty must be paid, which was not included by the ALJ.

E. Pursuant to Code of Maryland Regulations (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

**MARYLAND REAL ESTATE
COMMISSION**

v.

DION RAINEY,

RESPONDENT

and

CLAIM OF FREDDIE JONES

AGAINST THE REAL ESTATE

COMMISSION FUND

*** BEFORE ZUBERI BAKARI WILLIAMS,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH CASE No.: DLR-REC-24-13-21109**

*** MREC COMPLAINT No. : 2011-RE-440**

*** * * * ***

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

This is a Maryland Real Estate Commission (MREC or Commission) and Maryland Real Estate Guaranty Fund (Fund) (collectively, the Department) combined case stemming from allegations against real estate agent Dion A. Rainey (Respondent) made by homebuyer Freddie Jones (Claimant) in the purchase of a home located at 7215 Hedges Place, La Plata, Maryland.

On August 15, 2013, both the MREC and Fund filed a joint motion seeking issue preclusion against both the Respondent and the Claimant.¹ Specifically, the REC and Fund argued that a previous jury trial verdict in the Circuit Court of Charles County (Case No. 08-10000959) precluded the Respondent from contesting facts and liability in this matter. Also, the MREC and Fund argued that the jury verdict limited the Claimant's compensatory damages to \$13,350.00 and that he already recovered that amount at trial. On November 15, 2013, after briefing by all of the parties and a lengthy oral argument, I found in favor of the MREC and Fund. Specifically, I concluded the following:

The previous jury trial verdict in the Circuit Court of Charles County preclude[ed] the Respondent from contesting liability in this matter and also limit[ed] the Claimant's compensatory damages to \$13,350.00.

I then ordered the following:

ORDERED that the only issue concerning liability to be presented at the hearing on the merits is whether the Maryland Real Estate Commission's discipline levied against the Respondent was proper. It is further

ORDERED that the Claimant's compensatory damages are limited to the \$13,350.00 he won at trial.

I held a merits hearing on January 23, 2014, at the Office of Administrative Hearings' (OAH) Office at 11002 Viers Mill Road, Suite 408, Wheaton, Maryland 20902. Md. Code Ann., Bus. Reg. (BR) §§ 8-312, 8-407 (2010 & Supp. 2012). Assistant Attorney General Peter Martin represented the MREC. Assistant Attorney General Kris King represented the Fund. Spencer Stephens, Esq., represented the Respondent who was present at the hearing. Neither the Claimant nor his Attorney were present at the hearing.

¹ Issue preclusion is also known as collateral estoppel.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUES

1. What sanctions and/or penalties should be imposed against the Respondent?
2. What amount should be awarded to the Claimant from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on MREC's behalf:

REC Ex. #1 – REC Motion to Apply Collateral Estoppel with Exhibits a – p,
dated August 14, 2013

REC Ex. #2 – REC's Reply to Motion to Apply Collateral Estoppel with Exhibits a – g,
dated October 10, 2013

REC EX. #3 – Circuit Court Jury Verdict Sheet

REC Ex. #4 – Notice of Hearing, dated July 2, 2013

REC Ex. #5 – Corrected Notice of Hearing, dated July 24, 2013

REC Ex. #6 – Notice of Motions' Hearing, dated September 20, 2013

REC Ex. #7 – Notice of Hearing, dated November 25, 2013

REC Ex. #8 – Registration Certification, dated January 22, 2014

REC Ex. #9 – ALJ Marleen B. Miller Decision, dated July 28, 2005

I admitted the following exhibits on the Respondent's behalf:

Resp. Ex. #1 – Residential Property Disclosure and Disclaimer Statement Form

Resp. Ex. #2 – Residential Property Disclosure and Disclaimer Statement,
dated June 15, 2006

Resp. Ex. #3 – Residential Property Listing, dated April 12, 2006

Resp. Ex. #4 – Trial Testimony Excerpt of witness Malcolm Layton

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Resp. Ex. #9 – Brenda Jones's Answers to Interrogatories, dated September 30, 2010

Resp. Ex. #10 – Trial Testimony Excerpt of witness Ted Lewis

Resp. Ex. #11 – Report from Ted Lewis, Environmental Engineer

The Claimant did not offer any exhibits into evidence.

Testimony

The Respondent testified on his own behalf.

The MREC did not present any testimony and instead relied on its own documents.

The Fund did not present any testimony and instead relied on the MREC's documents.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:²

1. At all times relevant to this matter, the Respondent was a real estate agent (License No. 530590) and worked for ReMax Colonial Homes, Inc.
2. On or about July 13, 2006, the Respondent listed and sold a property located at 7215 Hedges Place, La Plata, Maryland 20646 (La Plata Property) to the Claimant.
3. The La Plata Property contained an abandoned ground storage tank containing heating oil. The soil was contaminated by the heating oil.
4. The Respondent never told the Claimant about the underground storage tank or the contaminated soil.
5. On or about September 28, 2011, the Claimant sued the Respondent for fraud, negligence (in failing to disclose a material fact), breach of duty, and joint and several liability.
6. At trial, a jury found the following against the Respondent:
 - a. The Respondent negligently misrepresented a material fact to the Claimant;
 - b. The Respondent breached a duty to the Claimant to disclose a material fact about which he knew or should have known;
 - c. The Respondent was negligent in failing to disclose a material fact about which he knew or should have known;
 - d. The Respondent defrauded the Claimant; and
 - e. The Claimant was entitled to \$13,350.00 in compensatory damages from the Respondent.

² As stated in my Partial Summary Decision Order, liability against the Respondent has already been established by a jury and resolved in this matter. I have included basic findings about liability here to merely give context to this order. To be clear, liability is not an issue in this matter.

DISCUSSION

I. The Claimant Failed to Appear and/or Prosecute His Fund Claim

As stated above, this is a combined MREC and Fund case stemming from allegations against the Respondent made by Claimant. On November 25, 2013, the OAH issued Notices of Hearing (Notices) to the Claimant, and his attorney Nicholas Andrews, Esquire, via certified and first class mail at their last addresses of record. The Notices stated that a hearing was scheduled for January 23, 2014 at 10:00 a.m. at the Office of Administrative Hearings—Wheaton, 11002 Viers Mill Road, Suite 408, Wheaton, Maryland, and that failure to attend the hearing might result in “dismissal of your case or a decision against you.”

The U.S. Postal Service did not return the Notice the OAH issued to the Claimant’s attorney, but it did return the “green card” evidencing delivery of certified mail on December 3, 2013 to the Claimant’s attorney. The U.S. Postal Service did return the Notice sent to the Claimant and indicated that it was “Unclaimed.”

On January 23, 2014, I convened the hearing as scheduled. Md. Code Ann., Bus. Reg. §8-407 (2010). Neither the Claimant nor anyone authorized to represent him appeared.

The Claimant bears the burden of proving by a preponderance of the evidence that he suffered an actual loss incurred as a result of misconduct by a licensed realtor in order to be compensated by the Fund. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2011) and § 8-407(e)(1) (2010); COMAR 09.08.03.03A(3).

The Claimant has not met that burden here. The Claimant and/or his attorney has barely participated or shown any interest in prosecuting this matter by failing to show up for hearings,

respond to motions or correspondence from my office, or appear at the hearing on the merits.

The Claimant's participation in his own claim has been paltry.³

Additionally, I previously found that that Claimant was only entitled to the \$13,350.00 in compensatory damages he won at trial and that he was precluded from seeking more. For these reasons, I **RECOMMEND** that the Fund dismiss his claim.

II. The Respondent's Violation of Statutes and Regulations

The MREC's power to regulate licensees, as pertinent to this case, is as follows:

(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:

...

(4) intentionally or negligently fails to disclose to any person with whom the applicant or licensee deals a material fact that the licensee knows or should know and that relates to the property with which the licensee or applicant deals;

...

(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[.]

Md. Code Ann., Bus. Occ. & Prof. § 17-322(b) (2010).

COMAR 09.11.02.01C states:

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.

³ Additionally, at the hearing on the merits, AAG Martin stated that he spoke to both the Claimant and his attorney a few days before the hearing and that they were aware of the date, time, and location of the hearing, but were unclear regarding their attendance.

COMAR 09.11.02.02A states:

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.

As stated above, I granted MREC and the Fund's joint motion to preclude the issue of liability because a jury had already adjudicated that issue. Specifically, the jury found:

- a. The Respondent negligently misrepresented a material fact to the Claimant;
- b. The Respondent breached a duty to the Claimant to disclose a material fact about which he knew or should have known;
- c. The Respondent was negligent in failing to disclose a material fact about which he knew or should have known;
- d. The Respondent defrauded the Claimant; and
- e. The Claimant was entitled to \$13,350.00 in compensatory damages from the Respondent.

As such, there is no need for me to disturb the jury's findings on liability. The above violations have been proven.

III. Regulatory Sanctions/Penalties

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, section 17-322(c) of the Business Occupations Article permits assessment of up to a \$5,000.00 monetary penalty,⁴ per violation, applying the following criteria:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;

⁴ 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."

- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee.

Here, the MREC argued that the Respondent's license should be revoked and he should be sanctioned \$5,000.00. I agree that this is a reasonable sanction for this Respondent for three reasons: (1) it was a serious violation that concerned his fraudulent acts against the Claimant in the purchase of a home; (2) he caused a large financial harm to the Claimant demonstrated by the jury's award of \$13,350.00 in compensatory damages; (3) the Claimant showed no remorse, understanding, or acknowledgement that what he did was wrong during the merits hearing before me. It is my view that, even after a full jury trial where he was found liable, he just does not understand that what he did was wrong and is likely to do it again. I find that the severity of the violation is high. As such, I recommend the Respondent's license be revoked and that he be sanctioned \$5,000.00.

CONCLUSIONS OF LAW

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

1. The Respondent violated Business Occupations Article § 17-322(b)(4), by negligently failing to disclose to the Claimant a material fact that he knew or should have known and that relates to the property;
2. The Respondent violated Business Occupations Article § 17-322(b)(25), by engaging in conduct that demonstrated bad faith and untrustworthiness;
3. The Respondent violated Business Occupations Article § 17-322(b)(32) by failing to comply with all applicable laws and regulations;
4. The Respondent violated Business Occupations Article § 17-322(b)(33), by violating the provisions of the Code of Ethics;

5. The Respondent violated COMAR 09.11.02.01C by failing to protect the public against fraud, misrepresentation, or unethical practices in the real estate field.
6. The Respondent violated COMAR 09.11.02.02A by failing to protect and promote the interests of the client.
7. The Respondent should be sanctioned \$5,000.00 to be paid to the Commission.
8. The Respondent's license should be revoked.
9. The Claimant's action against the Fund should be dismissed.

RECOMMENDED ORDER

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

1. The Commission's charges against the Respondent, under Business Occupations Article and Professions Article §17-322(b)(4), (25), (32) and (33), § 17-322(c), as well as COMAR 09.11.02.01C and 09.11.02.02A, are **AFFIRMED**.
2. The Respondent shall pay the Commission \$5,000.00.
3. The Respondent's license shall be **REVOKED**.
4. The Claimant's action against the Fund is **DISMISSED**.
5. The Commission's records and publications shall reflect this final decision.

April 23, 2014
Date decision mailed

ZBW/emh
#149013

SIGNATURE ON FILE

Zuberi Bakari Williams
Administrative Law Judge

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