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BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS  
ON REFERRAL BY REAL ESTATE COMMISSION

In the Matter of the Surety Fund Claim of: )  
 )  
 PAUL and CARROL PALMER, )  
 )  
 Claimants, )  
 )  
 v. )  
 )  
 DEAN R. BEAULIEU, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

OAH No. 04-0237-RES  
Commission No. S-23-012

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DECISION AND ORDER

I. Introduction

This real estate surety fund case involves a claim by Paul and Carrol Palmer alleging deceit, fraud, and intentional misrepresentation against real estate licensee Dean Beaulieu arising from the Palmers' development of residential real property near Wasilla, Alaska. The case is brought under Alaska's Real Estate Surety Fund laws at AS 08.88.450 – .495. After being served with the Surety Fund Claim for payment, Beaulieu requested a hearing. The case was transferred to the Office of Administrative Hearings.<sup>1</sup> An evidentiary hearing was held in conformance with the Administrative Procedure Act (APA)<sup>2</sup> and the Real Estate Commission's regulations at 12 AAC 64.280 – .325. Based on evidence from the hearing, it is recommended that the Palmers' claim be denied.

II. Facts

The APA and applicable surety fund laws require that a decision after a hearing be in writing and contain findings of fact and conclusions of law.<sup>3</sup> The following witnesses testified at the hearing: Carrol Palmer, Paul Palmer, Dean Beaulieu, and Elizabeth Tough. Claimants' Exhibits 1 through 27 and Respondent's Exhibits "R-1" through "R-4," and "R-10" through "R-

<sup>1</sup> The Office of Administrative Hearings (OAH) was created in 2004. See AS 44.64.010. Under a transitional provision relating to transfer of employees, the hearing officer for the Department of Commerce, Community and Economic Development was transferred to OAH.

<sup>2</sup> See AS 44.62.330 – .640.

<sup>3</sup> See AS 44.62.510(a); 12 AAC 64.325.

24” were admitted as evidence.<sup>4</sup> References are made in the findings to the audiocassette tapes of the hearing record, which are not transcribed at this time. Evidence in this case supports the following fact findings.

1. Dean Beaulieu was a real estate broker in Alaska in 2001 and 2002.<sup>5</sup> In September, 2001, Stephen and Elizabeth Tough wanted to build a single family residence near Wasilla, and they sought the services of Mr. Beaulieu. Initially, Mr. Beaulieu sold Mr. and Mrs. Tough Lot 8, Block 4 in the Tallerico Subdivision (Tallerico property), a parcel just less than one acre, for \$25,000 with \$500 down.<sup>6</sup> The property was listed with Best in the Land Realty, a brokerage owned by Mr. Beaulieu. The purchase contract for the raw land is dated February 28, 2002. Mr. Beaulieu agreed to assist Mr. and Mrs. Tough to find a builder for their new home. The Toughs chose the corporation P & P Construction. Timothy Palmer was a principal of P & P and he signed a new construction contract with Mr. and Mrs. Tough on April 8, 2002, agreeing to build a house on the Tallerico property for \$189,000 with \$2,000 down. As part of the construction contract, P & P agreed to first purchase the raw land. (Direct exam of Carrol Palmer, Direct exam of Beaulieu, Exhibits 1, 3)

2. P & P Construction lost its contractor’s license after starting to build the house. As a consequence, P & P’s membership in Mat-Su Home Builders Association was revoked on August 19, 2002, and Mr. and Mrs. Tough thereafter were unable to obtain financing for the house. They withdrew their loan application on August 23, 2002. (Direct exam of C. Palmer, Direct exam of Beaulieu, Direct, cross and re-direct exam of E. Tough, Exhibits R-1, R-2, R-4)

3. Paul and Carrol Palmer are husband and wife, and their son is Timothy Palmer. Mr. and Mrs. Palmer decided to help P & P Construction and their son by finishing construction of the house on the Tallerico property. Under an oral agreement with P & P, they agreed to provide the interim financing for completing the project.<sup>7</sup> Mrs. Palmer agreed to handle the accounting for P & P. Mr. Palmer would expedite and manage the project. Title to the Tallerico property

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<sup>4</sup> Exhibits “R-5” through “R-9” were withdrawn by respondent.

<sup>5</sup> He surrendered his license. See September 10, 2003, Real Estate Commission Order in Case Nos. 3000-02-003, 3000-02-011, 3000-03-002.

<sup>6</sup> The lot was not in Mr. Beaulieu’s name at the time of the transaction, but was in his business associate’s name, Richard Hunter. Title was transferred to Beaulieu’s name at the time of the interim loan payoff. Exhibit 17. In contrast, the earnest money agreement for the Tough’s purchase of the lot identifies Liberty D. Beaulieu as the owner.

<sup>7</sup> Mr. and Mrs. Palmer also handled financing for P & P to construct a house on Lot 25, Block 7, Donovan Subdivision.

was transferred to Mr. and Mrs. Palmer, and they provided financing to construct the house.<sup>8</sup> Mrs. Palmer acted as a vice president on behalf of P & P Construction and she had authority to sign for the business. At some point, Mr. Beaulieu obtained a deed of trust securing a loan he made to the builder.<sup>9</sup> (Direct exam of Beaulieu, Direct and cross-exam of C. Palmer, Exhibits 11, 19, 25, 27)

4. On behalf of Mr. and Mrs. Palmer, P & P continued to perform the work it could handle, and it used subcontractors for the other tasks. According to Mr. Beaulieu, Mrs. Palmer stated to him that the Palmers were taking over the corporation's business and Tim Palmer would do the construction "field work" on the Tallerico property.<sup>10</sup> Mr. and Mrs. Tough moved onto the Tallerico property during construction and lived in a trailer for 2.5 months, receiving water and utilities from lines to an adjacent property.<sup>11</sup> Mr. Beaulieu paid for the cost of utilities. According to Mr. and Mrs. Palmer, Mrs. Tough was effectively harassing their son by making demands while the project was underway. The Palmers were also concerned that Mrs. Tough was communicating too much with Mr. Beaulieu, contrary to their understanding that Beaulieu represented them as sellers,<sup>12</sup> and that there were too many requests by Mrs. Tough, including requests for financial concessions on materials. In contrast, Mr. and Mrs. Tough were concerned that progress on their home was behind schedule and also that there allegedly was drinking on the job by the builders. Communications between the parties started to break down. At some point, Mr. Palmer advised Mrs. Tough to deal only with him and to not communicate further with Mr. Beaulieu. On August 15, 2002, the Toughs made an unsuccessful attempt to modify the March 29, 2002, construction contract by addendum. Thereafter, with the house less than 25 % completed, Mr. and Mrs. Tough pulled out of the construction contract. Mr. Beaulieu returned all earnest money paid to Mr. and Mrs. Tough, without the knowledge or consent of the Palmers. (Direct and re-direct exam of E. Tough, Direct exam of C. Palmer, Exhibits 9, 11, 26)

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<sup>8</sup> Two quitclaim deeds for the Tallerico property dated June 17, 2002, from Mr. Beaulieu and Richard S. Hunter, his business associate, conveyed all interest to Paul and Carrol Palmer. Exhibits 20. Financing by the Palmers was obtained through personal loans from First National Bank Alaska, not construction loans. Exhibit 27.

<sup>9</sup> Although Mrs. Palmer testified that she denied the existence of a loan from Beaulieu, she acknowledged in writing that the note existed. Exhibit 11.

<sup>10</sup> No corporate minutes or other documents in evidence establish the Palmers' assumption of the role of builder under the March 29, 2002, new construction contract. Tim Palmer did not testify at the hearing. An August 5, 2005, statement by a loan officer at First National Bank Alaska represents that "Documents signed by Mrs. Palmer for P & P Construction were signed in her capacity as corporate Vice President for P & P Construction, Inc." Exhibit 27. The loan officer did not testify at the hearing.

<sup>11</sup> Mr. Tough reportedly worked on the North Slope.

<sup>12</sup> The Palmers claimed to be sellers in the transaction with the Toughs, through succeeding to P & P's rights as the builder under the new construction contract.

5. At this point, Mr. Beaulieu offered to purchase the property at a discount, and Mr. and Mrs. Palmer refused. On November 4, 2002, Mr. Beaulieu filed a lis pendens with the state recorder from Beaulieu v. P & P Construction, et al., Case No. 3PA-02-800 SC, giving notice that the civil action affected five parcels of real property, including the Tallerico property. The dispute was based in part on accounting services performed by Mrs. Palmer for Mr. Beaulieu as well as Beaulieu's concern about getting paid by the Palmers under the deed of trust obligation owed to him. On November 1, 2002, Paul and Carrol Palmer filed this surety fund claim alleging fraud, deceit and intentional misrepresentation by Mr. Beaulieu and Liberty D. Beaulieu and seeking \$189,000 in damages plus interest and attorney fees. The lis pendens was lifted by stipulation of the parties and approved by the court on February 14, 2003. The Palmers had to pay outstanding liens on the Tallerico property. Under terms of the March 29, 2002, new construction contract for the Tallerico property, Mr. & Mrs. Palmer were responsible for owner's title insurance. (Direct exam of Beaulieu, Direct exam of C. Palmer, Exhibits 3, 18, 19, 23, 24, 25)

6. The Palmers have not sold the Tallerico property. Although the P & P contract to construct the house, which they assumed, valued the property at \$189,000, the most recent appraisal of the house gave it a value of \$240,000. The Palmers stipulated at the hearing that the Tallerico property is worth \$51,000 more today than the original contract price. (Direct exam of Beaulieu, Exhibit 9)

### III. Discussion

#### A. Applicable Law

The central issue in this case is whether Mr. Beaulieu engaged in deceit, fraud, or intentional misrepresentation during this real estate transaction.<sup>13</sup> Under AS 08.88.460(a), a person seeking reimbursement for a loss suffered in a real estate transaction as a result of deceit shall make a claim to the commission for reimbursement on a form furnished by the commission. After considering the claim, the commission under AS 08.88.470

shall make written findings and conclusions on the evidence. If the commission finds that the claimant has suffered a loss in real estate transaction as a result of fraud, misrepresentation, deceit, or the conversion of trust funds or the conversion of community association accounts under the control of a community association manager on the part of a real estate licensee, the commission may award a claimant reimbursement from the real estate surety fund for the claimant's loss up to \$15,000. Not more than

<sup>13</sup> The Surety Fund Claim for Payment does not allege fraud or intentional misrepresentation.  
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\$15,000 may be paid for each transaction regardless of the number of persons injured or the number of parcels of real estate involved in the transaction.<sup>14</sup>

The statutory maximum recovery from AS 08.88.470 includes applicable interest.<sup>15</sup>

Under AS 08.88.472, the commission has the right to charge the surety fund for costs of a hearing. Hearing costs also are subject to reimbursement by the commission from the licensee. However, neither the surety fund law nor the APA gives the commission authority to award costs or attorney's fees to a party in a surety fund case.<sup>16</sup> Upon paying a claim, the commission is subrogated to a claimant's rights against the licensee under AS 08.88.490, and it may seek reimbursement from a licensee who is liable. A real estate license issued under AS 08.88 may be suspended along with a surety fund award, and it may remain suspended pending repayment of the award or hearing costs to the commission in accordance with AS 08.88.071(b).

The claimant in a surety fund case has the burden to establish the essential elements of a claim by a preponderance of the evidence in accordance with AS 08.88.465(d). In general, a preponderance of the evidence means something is more likely than not true. That is, there is a greater than 50 percent chance that it is true.<sup>17</sup>

Under the surety fund laws, a broker may not be found vicariously liable for the acts of a salesperson.<sup>18</sup> Accordingly, under AS 08.88.470, the Palmers must prove all elements of deceit, fraud or intentional misrepresentation in order to recover damages in this case.

These are related causes of action that have elements in common. Recovery is allowed if a knowing false representation, justifiable reliance and damage are established.<sup>19</sup> Intent is a question of fact that may be proven by inference through circumstantial evidence.<sup>20</sup> The representation must involve a material fact, one "which could reasonably be expected to influence someone's judgment or conduct concerning a transaction."<sup>21</sup> An individual's reliance on a material representation is justifiable, even if imprudent or exhibiting poor judgment, unless

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<sup>14</sup> AS 08.88.470.

<sup>15</sup> See AS 09.30.070 (prejudgment interest); 12 AAC 64.325(c).

<sup>16</sup> See Stepanov v. Homer Electric Ass'n, 814 P.2d 731, 737 (Alaska 1991); State v. Smith, 593 P.2d 625, 630-31 (Alaska 1979). Cf. Municipality of Anchorage v. Coffey, 893 P.2d 722, 731 (Alaska 1995)(attorney's fees in administrative appeal allowed on appeal per Appellate Rule 508(e), not Civil Rule 82).

<sup>17</sup> See Dairy Queen of Fairbanks, Inc. v. Travelers Indemnity Co. of America, 748 P.2d 1169, 1170-72 (Alaska 1988).

<sup>18</sup> See Rosenberg v. Moore, 3AN-99-08555 CI, 7/27/99 Decision and Order (O/L case Moore v. Yoon, et al., No. S97-009). In this case, there was no evidence to establish that Liberty D. Beaulieu was a real estate licensee.

<sup>19</sup> See Palmer v. Borg-Warner Corp., 838 P.2d 1243, 1248 (Alaska 1992) (citing W. Keeton, Prosser and Keeton on the Law of Torts sec. 105 at 728, 733-34 (5<sup>th</sup> ed. 1984)).

<sup>20</sup> See Gabaig v. Gabaig, 717 P.2d 835, 838 (Alaska 1986); Dargue v. Chaput, 88 N.W.2d 148, 155 (Neb. 1958). See also City of Fairbanks v. Amoco Chemical Co., 952 P.2d 1173, 1179 (Alaska 1998) (evidence of scienter is usually circumstantial).

the relying individual's conduct is wholly irrational, preposterous, or in bad faith.<sup>22</sup> The next section applies the applicable law to the facts in this case.

B. No Fraud, Deceit and Intentional Misrepresentation in this Case

Mr. and Mrs. Palmer's claim hinges on whether Mr. Beaulieu knowingly made a false representation. He did not. The Palmers' arguments that he did are addressed below.

They argued that Mr. Beaulieu committed actionable conduct under AS 08.88.470 because he "represented the buyers" (the Toughs) in the Tallerico property transaction when he had a duty to only represent the Palmers as builders under the construction contract.<sup>23</sup> The facts show that Mr. Beaulieu may indeed have represented both sellers and buyers in some aspects of the transaction, but there was no false representation. He did not hide any of his dealings with Mr. and Mrs. Tough, and some of his communications with them were a necessary part of moving the transaction along. A claim based on the fact that Mr. Beaulieu improperly acted for both sellers and buyers would be contractual or, if regulatory authorities choose, for violation of a statutory duty.<sup>24</sup>

The Palmers also argued that Mr. Beaulieu took advantage of their son Tim Palmer in setting the sales price for the property under the March 29, 2002, new construction contract because it was overpriced. The facts do not establish that Mr. Beaulieu misrepresented a material fact in setting the sales price. Tim Palmer was licensed as a contractor when he entered the transaction, and he was part-owner of a construction company. His plans were used for construction of the house. While he may have entered a construction contract that was disadvantageous to P & P, it was an arms-length transaction. The fact that Beaulieu may have known the loan amount that the Toughs pre-qualified for when negotiations with Tim Palmer took place does not constitute an intentional misrepresentation to Mr. and Mrs. Palmer. Mrs. Tough testified that she was treated less favorably by the contractors after an appraisal on the unfinished home came in at \$25,000 over the sales price. In summary, the evidence does not establish that Mr. Beaulieu made a material misrepresentation with regard to the price of the Tallerico property.

Next, the Palmers urge that Mr. Beaulieu committed actionable conduct under AS 08.88.470 because he did not disclose liens on the Tallerico property and because he

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<sup>21</sup> See Cousineau v. Walker, 613 P.2d 608, 613 (Alaska 1980); Restatement (Second) of Torts § 538 (1977).

<sup>22</sup> See Cousineau v. Walker, 613 P.2d at 616; Restatement, supra, § 537.

<sup>23</sup> Exhibit 3.

<sup>24</sup> Mr. Beaulieu surrendered his license. Moreover, it is not even clear that there was an appropriate written transfer of rights from P & P Construction to Mr. and Mrs. Palmer.

misrepresented there were no liens. The Palmers had to extinguish liens for a paving assessment and delinquent taxes. The contract for sale of the property addresses liens under the TITLE / PRORATION clause. In addition to requiring the builder to convey title by statutory warranty deed, the contract states "Builder [P & P] may pay any liens or encumbrances in order to make title marketable out of the builder's closing proceeds." On page one of the contract, the builder (P & P) was obligated to purchase title insurance. There was no credible evidence that Mr. Beaulieu misrepresented the status of liens. In addition, the contract placed the obligation to discover liens on the builder. P & P was the title owner of the raw land well before the house was completed.

Mr. and Mrs. Palmer also argued that Beaulieu's lis pendens was part of a calculated fraud, deceit or intentional misrepresentation to make things difficult for them in completing construction and selling the Tallerico property. The facts do not support this contention. No deceit or fraudulent misrepresentation of a fact was established in the lis pendens action, which was a public proceeding. While the lis pendens allegedly caused Mr. and Mrs. Palmer to finish construction of the Tallerico property "out of pocket," the Palmers did not establish that the lis pendens action was directly related to the Tallerico property transaction.<sup>25</sup>

In their closing argument, the Palmers argued that Mr. Beaulieu engaged in fraud because the Tallerico property was not in Beaulieu's name initially in this real estate transaction as he represented. Mr. Beaulieu was deeded title to the Tallerico property by his business associate on March 15, 2002, after the raw land was sold to Mr. and Mrs. Tough on February 28, 2002.<sup>26</sup> This is not a material fact in the Palmers' surety fund claim. There is no nexus between this misrepresentation, if it occurred, and damages alleged by the Palmers. The Palmers' argument is based on a statement by Tony Lerma, which is hearsay and was not admitted as evidence at the hearing. Moreover, it is likely that the Palmers placed no reliance on the misrepresentation when they took over as builder and as the source of financing on the project.

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<sup>25</sup> Mrs. Palmer testified that she threatened not to give Beaulieu his work papers if he did not pay for accounting work she performed.

<sup>26</sup> See Exhibit 17.

#### IV. Conclusion

Paul and Carrol Palmer did not meet the burden of proof to establish that Dean Beaulieu engaged in deceit, fraud, or intentional misrepresentation. It is recommended that the Real Estate Commission deny the Palmers' surety fund claim.

DATED this 17th day of December, 2005.

\_\_\_\_\_  
David G. Stebing  
Administrative Law Judge



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OAH No. 04-0237-RES  
Commission No. S-23-012

COMMISSION ACTION ON RECOMMENDED DECISION

Having reviewed the Recommended Decision and Order in surety fund OAH Case No. 04-0237-RES, Palmer v. Beaulieu, the Real Estate Commission hereby:

✓ Option 1: adopts the Proposed Decision in its entirety under AS 44.62.500(b).

Date 3/13/06 By: \_\_\_\_\_  
Chairperson *U*

Option 2: rejects the Proposed Decision under AS 44.62.500(c).

Date \_\_\_\_\_ By: \_\_\_\_\_  
Chairperson

Option 3: rejects the Proposed Decision under AS 44.62.500(c), and orders that the entire record be prepared for commission review and that oral or written argument be scheduled before the commission prior to the final consideration of the decision in this case.

Date \_\_\_\_\_ By: \_\_\_\_\_  
Chairperson

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OAH No. 04-0237-RES  
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**CERTIFICATE OF MAILING**

The undersigned certifies that she is employed by the State of Alaska, Department of Administration, Office of Administrative Hearings, in Anchorage, Alaska; that on the 20<sup>th</sup> day of December, 2005, she mailed, postage prepaid certified/return receipt requested/first class mail, true and accurate copies of the **Decision and Order** in the Matter of the Surety Fund Claim of **Palmer v. Beaulieu**, Case No. **04-0237-RES** to:

Lt. Governor's Office  
Rick Urion, Director of Occupational Licensing  
Sharon Walsh, Executive Administrator for the Real Estate Commission – hand delivered  
Paul and Carrol Palmer, Claimants  
Dean . Beaulieu, Respondent

By: \_\_\_\_\_  
Linda Schwass